TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 305.

THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA AND CHARLES MAYGER, PLAINTIFFS IN ERROR,

vs.

THE MONTANA MINING COMPANY, LIMITED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

FILED MAY 23, 1898.

(16,889.)

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INDEX.

Brief of Plaintiffs in Error. Washington, D. C. June 14, 1898.

1 In the Supreme Court of the State of Montana.

THE MONTANA MINING COMPANY (LIMITED), Plaintiff,
versus
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and Charles Mayger, Defendants.

Transcript.

Be it remembered that on the 13th day of July, A. D. 1896, a statement on motion for new trial was duly settled and signed by the judge of the first judicial district of the State of Montana in and for the county of Lewis and Clarke, that being the court in which said action was pending; which said statement was thereupon duly filed with the clerk of court. Said statement contains all the pleadings and other papers used on the trial, together with bills of
2 exception duly settled, and the judgment-roll; wherefore they are not again inserted in this transcript, but may be found properly indexed in said statement.

Said statement was and is in the following words and figures, to wit:

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

MONTANA MINING COMPANY (LIMITED), Plaintiff,
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and Charles Mayger, Defendants.

Statement on Motion for New Trial.

Now come the defendants in the above-entitled action, jointly, and each severally make this their statement and motion for a new trial within the time allowed by the court therefor and in pursuance of their notice heretofore given.

And among the records and proceedings in said action were the following, to wit:

On the — day of ——, A. D. 1894, the said plaintiff filed in said court the following complaint:

3 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE MONTANA MINING COMPANY (LIMITED), Plaintiff,
versus
CHARLES MAYGER and THE ST. LOUIS MINING AND Milling Company of Montana, Defendants. } Complaint.

The plaintiff complains of the above-named defendants, and for cause of action alleges:

I.

That this plaintiff is an incorporation duly organized and existing by and under the laws of the Kingdom of Great Britain, and doing and entitled to do business in the State of Montana by virtue of its compliance with the laws of this State regulating foreign corporations.

That the above-named defendant, The St. Louis Mining & Milling Company of Montana, is and was at the several dates hereinafter mentioned likewise an incorporation organized and existing by and under the laws of said State of Montana.

4 II.

And plaintiff further shows and alleges that on and prior to the 7th day of March, A. D. 1884, plaintiff's predecessors in interest, to wit, one William Robinson, James Huggins and Frank P. Sterling, Warren De Camp and John W. Eddy, who were then and there citizens of the United States and duly qualified mineral-land claimants, were the owners of, in possession of, and lawfully entitled to the use, occupation, and possession of all and singular that certain piece or parcel of mining ground, comprising a portion of the 9 Hour Lode mining claim, situate, lying, and being in Otter (unorganized) mining district, in the county of Lewis and Clark and State of Montana, more particularly described as follows, to wit:

Commencing at a point from which the center of discovery shaft of the 9 Hour lode bears south 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode between corners two and three, fifty feet distant, thence north 50 degrees 28 minutes east, on a line parallel to the aforesaid boundary line of the St. Louis Lode claim between corners two and three two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode claim between corners one and two; thence south degrees 28 minutes west, along the line of said boundary between corners one and two, 60.5 feet to corner No. 2; thence 48
5 feet to corner No. 3 of the St. Louis lode; thence north 48 degrees 10 minutes west, along the line of boundary of said St. Louis Lode claim between corners three and four, thirty feet distant, to a point; thence north 50 degrees 28 minutes east, along a line parallel to the boundary line of the St. Louis Lode claim between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the minerals therein contained; that thereafter, in causing to be surveyed for patent his St. Louis Lode mining claim, the above-named defendant, Charles Mayger, had wrongfully extended and caused to be extended the easterly boundary line of his said mining claim over the premises so above mentioned and particularly described; which said premises were then and ever since the 26th day of July, 1880, have been a part of the 9 Hour Lode mining claim, so the property of the aforesaid predecessors in interest of this plaintiff, and of which said portion and of the whole of said mining claim they were then and

there the owners, in the actual possession and entitled to the possession thereof. And thereupon said defendant, Charles Mayger, having wrongfully made application in the United States land office at Helena, Montana, to enter said premises as a part and portion of his said St. Louis mining claim, the said Robinson and Huggins duly made and filed in said land office a protest and adverse claim thereto, and thereafter, and within the time
6 allowed by law for such purpose, they commenced an action *the* the district court of the third judicial district of the Territory of Montana within and for the county of Lewis and Clarke to determine the right to the possession of the said premises. In the said action so commenced as aforesaid the said William Robinson and James Huggins were plaintiffs and the above-named defendant, Charles Mayger, was defendant therein, and the said court had jurisdiction to determine the subject-matter of said action; that thereupon and on the 7th day of March, A. D. 1884, to settle and compromise the said suit and adverse claim, and for the purpose of settling and agreeing upon the boundary line between the said 9 Hour Lode mining claim and the said St. Louis mining claim, the said defendant, Charles Mayger, made, executed, and delivered to said Robinson, Huggins, and Sterling a certain bond for a deed, in writing, whereby, in consideration of the compromise and settlement of said lawsuit and the withdrawal of said protest and adverse claim in the said land office, so that he might procure a United States patent, he thereby covenanted and agreed that when he should obtain such patent, and on demand of the said William Robinson, James Huggins, and Frank P. Sterling, or their heirs or assigns, he would make, execute, and deliver to them, their heirs or assigns, a good and sufficient deed of and for all the premises so above particularly mentioned and described, a copy of which said bond
7 for a deed is hereunto annexed, marked Exhibit "A," and hereby made a part of this complaint.

III.

And plaintiff further shows and states that thereupon the said Robinson and Huggins dismissed their said suit in said district court, withdrew their said adverse claim in the said land office, and duly performed on their part all of the terms and conditions of said contract to be by them kept and performed; that the said Charles Mayger thereupon proceeded with his application to enter said St. Louis Lode mining claim, and thereafter an United States patent was duly issued to him for said St. Louis Lode mining claim as surveyed, and included therein that portion of the 9 Hour Lode mining claim above particularly mentioned and described, but no notice was given to this plaintiff or any of its predecessors in interest of the issuance of said patent until on or about the — day of November, 1889; that upon the execution of said bond for a deed the said predecessors in interest of this plaintiff were in possession of the premises above mentioned and described, and they and their successors in interest ever since have been and yet are in the pos-

session thereof, holding, using, and enjoying the same as a part and portion of their said Nine Hour Lode mining claim.

8 IV.

And plaintiff further shows and states that by mesne conveyance the title to the said Nine Hour Lode mining claim and the whole and every part thereof, including the portion thereof above particularly mentioned and described, has come to it, and it is now the owner thereof and in the possession and entitled to the possession of the whole and every part of said 9 Hour Lode mining claim; that, being so the owner of said mining claim and being so entitled to a conveyance of the portion thereof above particularly mentioned and described, this plaintiff, on or about the — day of July, A. D. 1893, demanded of and from the said defendants that they make, execute, and deliver a good and sufficient deed to it of and for the premises above mentioned and described in compliance with the terms and conditions of the said bond, no demand for the execution of said deed having been previously made by said plaintiff or any of its predecessors in interest; but the said defendants then and there refused and ever since — neglected and refused to make, execute, or deliver said deed, though often requested so to do.

V.

And plaintiff further shows and states that not only has the said defendant, Charles Mayger, refused and declined to comply with the request of the plaintiff that he make and execute to it a deed
9 for the said premises above particularly described, as in and by his said bond for a deed he covenanted and agreed to do, but on or about the 10th day of June, A. D. 1893, for an alleged consideration of one thousand dollars, he made, executed, and delivered of and for said premises to the said defendant, The St. Louis Mining and Milling Company of Montana, but plaintiff avers that at the date of the execution of said deed the said defendant, The St. Louis Mining and Milling Company of Montana, had full knowledge and notice of the making, execution, and delivery of the said bond for a deed by its said codefendant and of the rights and equities of plaintiff thereunder as being the successor in interest of the said Robinson, Huggins, Sterling, and its other grantors.

And plaintiff further alleges that the said defendants have conspired and confederated together for the purpose of cheating, wronging, and defrauding this plaintiff out of the said premises, and to that end the said defendant and the St. Louis Mining and Milling Company of Montana has instituted a number of suits in the circuit court of the United States within and for the district of Montana, in which it claims that it is the owner of the premises above particularly described by virtue of the deed so wrongfully and fraudulently made, executed, and delivered to it by its said codefendant, as aforesaid, and in which said actions it claims the right to recover large sums of money for ores therein alleged to have been wrong-
10 fully mined from said premises by this plaintiff; that in order to successfully defend itself against said suits and in order to

remove the cloud from plaintiff's title to said premises caused by the execution of the said deed to the said defendants, The St. Louis Mining and Milling Company, it is necessary that the said defendants should be compelled to make, execute, and deliver to this plaintiff a deed for the said premises, as in equity and good conscience they ought to do.

Wherefore, the premises considered, plaintiff prays that by the proper order or decree of this court the said defendants be adjudged and decreed to make, execute, and deliver to plaintiffs a good and sufficient deed for the premises above mentioned and described, and that in the event of their failure so to do the decree of this honorable court may have the force and effect of such deed; that plaintiff may have such other and further relief as may be in accordance with equity and good conscience, and that it have judgment for its costs.

M. KIRKPATRICK &
CULLEN & TOOLE,
Pl'ff's Att'ys.

Duly verified by Jos. K. Toole, as attorney, on September 5th, 1894, before W. E. Cullen, Jr., notary public, Lewis and Clarke county, Montana.

11 EXHIBIT A.

Know all men by these presents that I, Charles Mayger, am held and firmly bound unto William Robinson and James Huggins and Frank P. Sterling in the sum of fifteen hundred dollars; for the payment of which, well and truly to be made, I hereby bind myself, my heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with my seal and dated this 7th day of March, A. D. 1884.

The consideration of this obligation is such that whereas a certain cause now depending in the district court of the third judicial district, Lewis and Clarke county, Montana, between William Robinson and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said William Robinson and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger for patent, now pending in the United States land office at Helena, Montana:

Now, then, in consideration thereof and the further consideration of one dollar, to the said Charles Mayger in hand paid by the said William Robinson and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises, and agrees to proceed at once upon his application now pend-
12 ing in the United States land office at Helena, Montana, for a patent to the St. Louis Lode claim described therein, and situated in Lewis and Clarke county, Montana Territory, and procure as soon as practicable a Government patent therefor, and when such title shall have been procured according to said application said Charles Mayger hereby covenants, promises, and agrees, upon

the demand of the said William Robinson and James Huggins and Frank P. Sterling or their heirs or assigns, to make, execute, and deliver to the said William Robinson, his heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece, or parcel of mining ground situated in Lewis and Clarke county, Montana Territory, and comprising a part of two certain quartz lode mining claims, known as the St. Louis Lode claim and the Nine Hour Lode claim, and particularly described as follows, to wit: Commencing at a point from which the center of the discovery shafts of the Nine Hour lode bears S. 39 degrees 32 minutes east, said course being at right angles to the boundary line of the St. Louis lode, between corners 2 and 3, 50 feet distant, thence north 50 degrees 28 minutes E., on a line parallel to the aforesaid boundary line on the said St. Louis Lode claim, between corners 2 and 3, 225 feet to a point on the boundary line of the St. Louis lode between corners 1 and 2; thence south 20 degrees 28 minutes E. along
13 said boundary, between corners 1 and 2, 60.5 feet to corner No. 2 of the St. Louis lode, 40,031 feet to corner number 3 of the St. Louis lode; thence N. 46 degrees 10 minutes W. along the *along of* boundary of St. Louis lode, between corners 3 and 4, 30 feet to a point; thence north 50 degrees 28 minutes E. along the line parallel to the boundary line of the St. Louis lode, between corners 2 and 3, 230 feet to the point of beginning, including an area of about 12,844.50 sq. feet, together with all the mineral contained therein; and if the said Charles Mayger, his heirs or assigns, shall make, execute, and deliver the said deed of conveyance, as by this agreement provided and intended, then this bond and agreement to be null and void; otherwise to be and remain in full force and effect.

Witness my hand and seal the day and year first above written.

CHARLES F. MAYGER. [SEAL]

The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [SEAL]

Witness:
J. K. TOOLE.

Duly acknowledged.
Filed and recorded March 8th, 1884, at 3 a. m.

14 And thereafter the defendants appeared and filed their general demurrer thereto, which was overruled by the court, and to which ruling defendants excepted.

And thereupon and on the — day of ——, A. D. 189–, said defendants filed their answer to said complaint, which was as follows:

Title of Court.

Title of Cause.

And now come the defendants herein and for answer to the complaint of plaintiffs:

I.

Admit that the said William Robinson, James Huggins, and Frank P. Sterling, Warren De Camp and John W. Eddy were at the date mentioned in said complaint citizens of the United States and duly qualified mineral claimants, but on their information and belief deny that they were or are the predecessors in interest of said plaintiff, or that they were the owners or possessors of the piece, tract, or parcel of land in said complaint described, or in the possession or entitled to the possession thereof or any mineral therein, then or at any other time, or that the same was or is a part of the Nine Hour Lode claim, and aver that the same was and is a part of the St. Louis Lode mining claim, designated and known as such, and embraced and included in the United States patent obtained by the said defendant, Charles Mayger, for said St. Louis Lode mining claim, as hereinafter set forth.

Deny that defendant Charles Mayger, wrongfully or otherwise, extended or caused to be extended the easterly boundary line of said St. Louis mining claim over the said described premises or any part thereof, but admit that he caused a survey to be made of the same, and aver that the boundary lines of said St. Louis mining claim as originally located included and embraced the said *locus in quo* and every part thereof at and prior to the location of the said Nine Hour Lode claim, and that the said Charles Mayger and his successors in interest hath ever since been and now are in the possession of the same and entitled thereto, save and except a small strip thereof occupied by a portion of the ore-house of plaintiff by sufferance of defendants.

And on their information and belief deny that said Charles Mayger wrongfully made application in the United States land office to enter said premises, and aver that the same was and at all times had been a part and portion of the said St. Louis mining claim.

Admit that the adverse claim of Robinson and Huggins was interposed to said application, and that they instituted an action, as in said complaint mentioned, and that said agreement was entered into, but deny that it was for the purpose of settling or agreeing upon the boundary line between the said Nine Hour Lode mining claim and said St. Louis Lode mining claim, and aver that the same was executed to said Robinson, Huggins, and Sterling as a compromise on account of their adverse claim and suit aforesaid, and comprised a part of the said St. Louis Lode claim owned and possessed by the said Charles Mayger, and to enable him to obtain a patent for the whole thereof according to his said survey, and agreed to convey the same as in said bond set forth.

Defendants admit that by the terms of the said bond the said Charles Mayger agreed, after obtaining a patent therefor, on demand of the said Robinson, Huggins, and Sterling, to make to them, their heirs or assigns, a good and sufficient deed for the premises in said complaint described, and on their information and belief aver that said plaintiff never has acquired or succeeded to the right, title, or interest of said Robinson, Huggins, or Sterling to said premises or any thereof, by conveyance or otherwise.

Deny that said Exhibit A, as set forth, is a copy of the said bond, in that it obligates said Charles Mayger to make a good and sufficient deed to said Robinson alone, and aver the facts to be the said original bond obligated said Charles Mayger to execute a deed on demand to the said Robinson, Huggins, and Sterling, their heirs or assigns, as expressly set forth and alleged in said complaint.

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II.

Admit that the said Charles Mayger obtained a patent for said St. Louis Lode mining claim, but deny that it contained any portion of said Nine Hour Lode mining claim, and aver that the said plaintiff and predecessors in interest had full knowledge and notice of the issuance of said patent mentioned, and were all aware and apprised thereof at or about the date of the issuance of the same.

Deny that at the time of the execution of the said bond or at any other time the said plaintiff or its predecessors in interest were or ever have been in possession of said premises or any part thereof, except the small portion aforesaid, or that they or either of them used or enjoyed the same or any part, except the small part aforesaid, or that they ever had, held, or enjoyed any part thereof as a part of said Nine Hour Lode mining claim.

III.

Admit that the said plaintiff by mesne conveyances acquired the title to said Nine Hour Lode mining claims, but deny that the said conveyances or any conveyances to plaintiff embraced or included the premises in said complaint mentioned and described or any part or portion thereof.

Admit that the said plaintiff demanded of defendants a deed to said premises, as set forth in said complaint, but deny that no

18 demand therefor was ever theretofore made, and aver the facts to be as hereinafter stated.

IV.

Deny that the said defendants or either of them had any knowledge or notice that the said plaintiff was the successor in interest of said Robinson, Huggins, and Sterling or either of them at the time of the making the deed by the said defendant, Mayger, to his said codefendant, and on their information and belief deny that the said plaintiff is the successor in interest of said Robinson, Huggins, and

Sterling or either of them in said premises so embraced in said Mayger's survey and patent or any part thereof.

Deny that defendants have combined or confederated together for the purpose of cheating, wronging, or defrauding plaintiff out of its right or title to said premises or any part thereof, and aver, as heretofore, that the said plaintiff has not and never had any right or title to said premises or any part thereof as successor in interest to any one whomsoever.

Deny that the claim of defendants or either of them casts any cloud upon any title of plaintiff, or that it is necessary they or either of them should execute a deed to plaintiff for said premises or any part thereof to satisfy the requirements of equity or for any other cause or reason, and aver that if the said conveyances to plaintiff for said Nine Hour Lode mining claim included said premises, as alleged, no such transfer or conveyance is necessary for any purpose.

And these defendants, for further answer to the complaint of plaintiff, show unto this honorable court that the said adverse claim aforesaid was interposed for the purpose of harrassing and delaying said Mayger *from* obtaining a patent to his said St. Louis mining claim, and that the said bond was executed as a compromise to avoid the same; all of which was done contrary to equity and good conscience and for the sole purpose aforesaid.

That on the 22nd day of July, 1887, the said Charles Mayger, grantor of his codefendant, obtained and procured a United States patent for the premises described in his complaint as a part and portion of his St. Louis mining claim in accordance with his possession and the survey had thereof, on account of which he acquired the legal title thereto and had and held the possession thereof.

That the said defendant, The St. Louis Mining and Milling Company of Montana, ascertaining and learning that the said conveyances to said plaintiff did not comprise the said premises described in plaintiff's complaint, and that it had and held no title thereto, and for the purpose of better securing the possessory title by it had and held, obtained and received the deed from said Charles Mayger mentioned and described in plaintiff's complaint.

And these defendants, for further answer to the complaint of the plaintiff and in pursuance of section 105, Code of Civil Procedure, Compiled Statutes Montana, allege generally that the cause of action set forth in plaintiff's complaint is barred by the provisions of secs. 29, 30, 31, and 32, subsec. 2, sec. 41, and sec. 47 of said Code of Civil Procedure, and had been so barred at the time of the execution of said deed to said defendant company.

Wherefore defendants pray this honorable court that if it shall appear the said plaintiff is not the owner of the said premises by any of the conveyances mentioned in its said complaint or the title by it so pleaded that the same be decreed null and void, and that the right, title, and claim of defendant company be decreed superior to the claim of plaintiff in the premises in controversy; that such other and further relief may be had as in equity and good conscience

they or either of them may seem entitled, and that they receive their costs and disbursements in this behalf expended.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Defendants.

Duly verified.
Filed January 2nd, 1895.

21 Whereupon and on the — day of ——, A. D. 1895, said plaintiff filed its replication, which is as follows:

Title of Court.

Title of Cause.

Now comes the plaintiff and, replying to the new matter in the answer of defendants filed herein:

I. Denies that the premises particularly mentioned and described in the complaint herein are or ever were any part of the St. Louis mining claim in any other way or manner or at all, except that the same were by the agreement aforesaid to be embraced in the application of the said Charles Mayger for a patent, as in the complaint herein mentioned and set forth.

II. Denies that the boundary lines of the St. Louis mining claim as originally located included or embraced the *locus in quo* or any part or portion thereof, and denies that the said Charles Mayger or his successors in interest are now or ever have been in the possession of the same or entitled thereto or any part or portion thereof.

III. Denies that the said original bond obligated the said Charles Mayger to execute a deed on demand to the said Robinson, Huggins, and Sterling, but, on the contrary, avers that the copy of said bond attached to the complaint herein is a true copy thereof.

22 IV. Denies that the said adverse claim mentioned in the complaint herein was interposed for the purpose of harrassing or delaying the said Mayger from obtaining a patent to his said St. Louis Lode mining claim, and denies that there was anything in or about the execution or delivery of the said bond contrary to equity or good conscience.

V. Plaintiff denies that the said defendant, The St. Louis Mining & Milling Company of Montana, ever had or held a possessory title to the premises in the complaint herein particularly mentioned and described, or that it obtained or received a deed from said Charles Mayger for the better securing of any such title.

VI. Denies that the cause of action set forth in plaintiff's complaint is barred by the provisions of secs. 29, 30, 31, and 32, subsec. 2, sec. 41, and sec. 47 of the Code of Civil Procedure of the State of Montana or any or either thereof or at all.

Wherefore plaintiff prays judgment as in its complaint herein.

M. KIRKPATRICK,
CULLEN & TOOLE,
Attorneys for Plaintiff.

Duly verified.

23 And said plaintiff, to support the issues on its part, introduced the deposition of WILLIAM ROBINSON, who testified, in so far as matters are material herein, as follows:

My name is William Robison. I am over fifty years old. I have mined for twenty-five years, and reside at Seattle, in the State of Washington.

I was in the vicinity of Marysville about the 26th day of July, 1880, and on that day I located the Nine Hour lode claim.

Int. 3. If in answer to the last interrogatory you say that you were in the vicinity of Marysville, in the county of Lewis and Clarke, State of Montana, on or about said date, and that on or about said time you were engaged in locating Nine Hour Quartz Lode mining claim, you may state what, if anything, you then or heretofore discovered within the bound at lines of said mining claim in the way of gold, silver, or other precious metals, and what, if any, development works were made thereon, with reference to disclosing one or more of the walls of said lead.

A. I discovered about that time, on the Nine Hour lode claim, a vein of quartz containing gold; there was silver in it also, but I could not tell so well about that, but I could see gold in the quartz. I also disclosed one well defined wall to the lode in the discovery shaft or hole on the lode.

24 Int. 4. What, if anything, did you do on or about said date with regard to marking the boundaries of said Nine Hour Lode mining claim, and how were the same marked?

By Mr. TOOLE: We desire, may it please the court, to interpose an objection to those last two interrogatories, and so far as these objections are concerned, we do not desire, as the case progresses, to take up the time of the court in the argument of them, but would like to preserve them so that they may come up on a motion that we may possibly hereafter make.

By Mr. CULLEN: We have no objection, provided you extend us the same courtesy, that when it comes to your testimony the objections may go in and all of the questions of law be argued later. You can state your objections now and we will do the same.

By Mr. TOOLE: Formally, we object to the question and answer Nos. 3 and 4 for the reason, first, that the complaint in this case does not state facts sufficient to constitute a cause of action or authorize the relief demanded or any other relief; second, because the patent itself in this action is conclusive evidence that all the steps necessary for its procurement have been taken; third, because

25 the patent carries with it the legal title and possession of the premises, which cannot be the subject of dispute subsequent to its issuance.

By the COURT: Do you say you desire me to pass upon these objections?

By Judge CULLEN: No, sir; when we argue them. It saves time to do that.

By Mr. TOOLE: Suppose it be noted, then, that all other interrog-

atories and answers that come within the purview of these objections will be deemed objected to.

By Judge CULLEN: Call them out, "I object on the same ground," so that we may know what specific ones you object to.

By the COURT: Is the Nine Hour a patented claim?

By Judge CULLEN: Yes, sir; both claims are patented.

A. I marked the boundaries of the claim with stakes. The stakes were square, four or five inches, and they were three or four feet in height, and they were firmly planted in the ground. I put up a stake at discovery shaft, on which I put the name of the claim, the date of location, names of locators, and the number of feet
26 claimed. I claimed 750 feet northeasterly and 750 feet southwesterly from the discovery shaft. I also planted a center stake in the north and south end lines of the claim and a stake at each corner of the claim. On each stake I put the name of the lode and a description of each particular stake, as to it being a center or corner stake.

Int. 5. What, if any, notice was posted on said claim? And if any notice was posted thereon, you may tell where the same was posted, and when, and by whom.

Objected to for the same reason.

A. I have answered this in my answer to the foregoing question. The notice was written with a pencil on the stake. At or about the time I recorded my notice of location, I put a copy of that notice on the stake at discovery. I copied the notice put on the stake from the one which was recorded.

Int. 6. If thereafter you filed or caused to be filed in the recorder's office a notice of location of said Nine Hour lode, you may state in what recorder's office the same was so filed, and generally the facts and circumstances attending the making of said notice of location.

Objected to for the same reason.

A. I caused a notice of location notice to be recorded in the office of the recorder of the county of Lewis and Clarke, in the then Territory of Montana. I sent the notice in by James Huggins to
27 be recorded, and gave him the money to pay for it. I agreed to give Mr. Huggins an interest in the claim if he would do some work on it. Accordingly, I gave him a third interest and had his name put in the location notice for that interest. This is why I send the location notice in by him to have it recorded.

Int. 7. If in answer to the 5th interrogatory you say that there was a notice posted on the claim, you may state how the notice so posted compared, with reference to the facts therein stated, with the one recorded.

Same objection as before.

A. The notice of location recorded was copied from the one on the stake.

Int. 8. What information did you have at that time with reference to the location of the St. Louis Lode mining claim? Where was

the same situated with reference to the Nine Hour Lode mining claim located by you, and about how near to the side line of the St. Louis Lode mining claim was the northwest stake of your Nine Hour Lode claim located?

By Mr. TOOLE: Objected to for the same reason as before, and also for the reason that the patent to the St. Louis Lode mining claim, as alleged in the complaint and admitted in the answer, and the title thus obtained is the title sought to be acquired, and for the reason that the said patent is conclusive in this action as to
28 the staking, discovery, possession, and all other antecedent steps necessary for its procurement, and for the reason that the complaint in this action does not state facts sufficient to constitute a cause of action or to authorize the relief demanded or any relief whatsoever.

A. I knew where the St. Louis Lode claim was. I had seen the stakes on that claim and I knew particularly where the northeast and southeast corners of that claim were. It was situated westerly from my Nine Hour claim. My northwest corner stake was a considerable distance east of the eastern boundary line of the St. Louis claim.

Int. 9. About how near, if you know, was the westerly side line of your Nine Hour Lode mining claim to the easterly side line of the St. Louis Lode mining claim at the nearest point?

Same objection as before.

A. I cannot say how near the westerly side line of my claim was to the easterly side line of the St. Louis claim, but I was careful to have a strip of vacant ground between the Nine Hour and St. Louis claim-, as I did not want to have any conflict between my claim and the St. Louis claim.

Int. 10. What information, if any, had you at the time you located your Nine Hour Lode mining claim as to where the northeast and southeast corner stakes of the said St. Louis Lode mining claim were, and how did the westerly side line of your Nine Hour claim run with reference to said stakes?

29 Same objection as before.

A. As I have already said, I particularly knew where those two stakes were, and my westerly line was some feet east of a line drawn from the northeast to the southeast corner stakes of the St. Louis claim.

Int. 11. At the time you so located the Nine Hour Lode mining claim, were you acquainted with Mr. Charles Mayger and Mr. William Mayger; if so, how long had you known them prior to that date? Where did they reside at the time you made your location, and what knowledge, if any, did they have of the location of your Nine Hour Lode mining claim?

By Mr. TOOLE: All of that portion of the interrogatory referring to what knowledge the said Charles Mayger or William Mayger

may have had of the location of the said claim is objected to for the reason that the same is immaterial and irrelevant.

A. I was acquainted with both of them at that time. They lived at Marysville, within sight of my claim. After I had made my location and before the survey of the St. Louis claim for patent, both Charles and William Mayger were on my Nine Hour claim. I remember seeing them there.

Int. 12. If in answer to the last question you say they resided at Marysville, in the vicinity of your said location, you may
30 state what claim, if any, they made to you, or in your presence, that there was any conflict between your location and that of the St. Louis mining claim of Charles Mayger.

Objected to for the same reason.

A. They never made any claim that the Nine Hour conflicted with the St. Louis claim before the St. Louis was surveyed for patent. On the contrary, Charles Mayger, the claimant of the St. Louis, said to another person that they did not conflict.

Mr. TOOLE: We move to strike that portion of the answer of the witness out in which he states what some one else said; and we will add an additional objection to the answer, for the reason that he assumes to state what he said to some third person, as hearsay.

Int. 13. When did you first learn that the said Charles Mayger claimed that there was a conflict between his St. Louis lode and your Nine Hour mining lode claim, and how were the two lodes made to conflict?

Objected to for the reason that it is immaterial and all those matters are excluded by the issuance of the respective patents for the Nine Hour and St. Louis mining claims, and for the reason that as to when he learned that they claimed there was a conflict is immaterial.

A. I did not learn that he claimed there was any conflict
31 between the two locations until after the St. Louis claim surveyed for patent. The two claims were made to conflict by their running their easterly side line from their northeast corner stake up the hill to a point on my Nine Hour claim, which they designated in their survey as corner No. 2 of their claim; from this point they run in a southwesterly direction to what was designated in the survey as corner No. 3 of their survey. This corner was also on my Nine Hour claim and quite a distance northeast of where the southeast corner stake of the St. Louis claim stood at the time I made my location.

Int. 14. If in answer to the last question you say that you first ascertained that Charles Mayger claimed there was a conflict between your Nine Hour claim and the St. Louis Lode mining claim, at or about the time he caused his said St. Louis Lode mining claim to be surveyed for a patent, you may state what, if anything, you ascertained with reference to any alteration from where they had originally stood of the stakes of the said St. Louis claim.

Objected to for the reason given to the last interrogatory, and for all the reasons heretofore assigned.

A. When I made an examination of the ground after Mayger had made his survey for the patent, I found that the southeast corner stake of the St. Louis location had been recently reblazed and
32 was freshly marked "Center stake St. Louis lode," and a new stake had been placed near the easterly side line of my Nine Hour claim, which stake was marked "Southeast corner St. Louis lode." This stake was surrounded by rocks, and the grass under the rocks was mashed down by the piling of the rocks around the stake—that is to say, the rocks had been placed there after the grass had grown there during the summer of 1881. I removed the rocks and saw that grass had grown that season on the ground where they were piled.

Int. 15. If in answer to the last preceding interrogatory you say that any stake of the St. Louis Lode mining claim, at or about the time of making such survey, was planted up near the easterly boundary line of your Nine Hour Lode mining claim, you may state whether the same was done at or prior to the time that you so located your Nine Hour Lode mining claim, and state fully what examination you made at the time you made your location to ascertain whether there were stakes marking the boundary lines of other mining claims in the vicinity of your said Nine Hour Lode mining claim.

Same objection.

A. The stake I mentioned in my last answer as having been placed up near my easterly boundary line was put there after my location was made. Prior to making my location I examined all of the ground inside my boundary lines for stakes of mining claims, and I am positive that the stake just mentioned was not there at the time.

33 Int. 16. After the settlement of your adverse claim and the suit brought thereon in the district court of Lewis and Clarke county, Montana, what possession, if any, did you and your cotenants have of the thirty-foot strip of ground mentioned and described in the bond executed to you by Charles Mayger, a copy of which is attached to the complaint in this action?

Same objection.

A. Myself and partner had possession of this ground both before and after the making of the bond. At the time of the making of the bond the greater part of my blacksmith shop stood on the thirty-foot strip, and the dump from my discovery shaft was also on said strip, and extended over the westerly side line of said strip onto the ground which by the bond and settlement I relinquished to Mayger as a part of his St. Louis claim. I sunk some small prospecting holes on this strip, had a wagon road on it, and did whatever I wanted to on it. It was the distinct understanding between myself and Charles Mayger, at the time when this compromise was made

and bond executed, that the westerly side line of this thirty-foot strip was to be the boundary lines between our claims; all west of it to be the St. Louis claim, and all east of it was to be the Nine Hour claim.

Int. 17. After the location of your Nine Hour claim did you and your co-owner perform any work upon said claim prior to
34 the time you parted with your interest therein; if so, upon what part of this claim was it performed, and when performed, and what did such work consist of, and where, with reference to said thirty-foot strip, was your shaft-house and dump?

Same objection.

A. After the location and up to the time I sold out to Mr. Bratnober I did considerable work on the claim, mainly at the discovery shaft. At the time I sold out the shaft was sunk to a depth of about sixty feet, and from near the bottom of it a drift or level was run to the south a distance of about thirty feet. There were also prospect holes sunk in a number of places on the claim for the purpose of ascertaining the course of the lode and for general prospecting purposes. The top of the discovery shaft was within about ten feet of the easterly side line of the thirty-foot strip, and the dump, as I have already said, extending across the strip onto ground which before the compromise had been a part of my Nine Hour claim, but which by the compromise I relinquished to Mayger as a part of his St. Louis claim. The shaft-house was wholly east of the east line of the strip.

Int. 18. How did the thirty-foot strip of ground mentioned in said bond for a deed, executed by said Charles Mayger, lie with reference to the boundary lines of your Nine Hour Lode mining claim as originally staked by you? Was or was not the said thirty-foot strip wholly included within the said boundary line?

35 Same objection.

A. The thirty-foot strip was wholly within the original boundary lines of my claim.

Int. 19. Was the said thirty-foot strip of ground already mentioned the whole of the ground in conflict between the said Nine Hour and the said St. Louis claim, as the said St. Louis claim was surveyed for a patent, or only a part of it?

Same objection.

A. Only a part of it. The total area in conflict was about two acres.

Int. 20. From the time of the execution and delivery of said bond to you, what work, if any, did the defendant Charles Mayger, or any of said defendants, do upon the said thirty-foot strip of ground mentioned in said bond, or what claim, if any, was made subsequent to the execution of said bond, and while you continued to be the owner of said Nine Hour mining claim, of any right on the part of said Charles Mayger to possess or control said thirty-foot strip or any part thereof?

Same objection.

A. They never did any work or made any claim to said strip prior to the time I sold out of the said claim.

Int. 21. Subsequent to the making of said bond for a deed, how long did you continue to be the owner of an interest in said Nine Hour Lode mining claim, and when and to whom did you dispose of your interest therein?

36 Mr. TOOLE: Objected to for the reason above given, and also for the reason that the conveyance made by witness does not comprise the thirty-foot strip in controversy.

A. I sold out my interest in said claim in March, 1886, to Henry Bratnober.

Int. 22. Where were you and in what were you engaged in the year 1887, A. D., and particularly during the last half of that year?

A. I was engaged in running a saw-mill in Cascade county, Mont., and in selling lumber at the city of Great Falls, in that county, and was so engaged during the fall of that year.

Int. 23. If at any time during the fall of 1887 you had any conversation with the defendant Charles Mayger with reference to the said thirty-foot strip of ground or with reference to a deed therefor, you may state when and where such conversation took place and what was said by you with reference to the same, and state fully what the conversation was.

A. I do not remember having any conversation with Charles Mayger with reference to the thirty-foot strip or upon any other subject that year. I do not remember to have seen him during that year.

Int. 24. Was any demand for a deed to the said thirty-foot strip ever made by you of the said Charles Mayger in the latter part of the fall of 1887 or at any other time?

A. I never made a demand of Charles Mayger for a deed
37 to said thirty-foot strip, either in the fall of 1887 or at any other time. I did not know then and do not now know that he had received a patent for the St. Louis claim in 1887, and at that time I had no interest in the Nine Hour claim.

Int. 25. If there is any other matter or thing touching the issues in this case about which you have not already testified you may declare the same fully and at large as if thereunto particularly interrogated.

A. I do not think of anything, except prior to the time I deeded all of my interest in the Nine Hour to Bratnober I deeded a sixth interest to John W. Eddy, Stephen E. Atkinson, and others. I sold them a sixth, so as to make them the owners of an undivided half interest in the claim.

Cross-examination:

I discovered the lode—that is, the Nine Hour lode—and took James Huggins in, giving him an undivided one-third interest in it. Afterwards Warren De Camp, Frank P. Sterling, S. E. Atkinson,

John W. Eddy, M. Bullard, and C. A. Broadwater became interested in it. It never was any part of the St. Louis Lode claim. I sunk prospect holes on it, built my blacksmith shop partly on it, and did any work on it that I wanted to do. I worked on the thirty-foot strip the same as I did on any other part of the Nine Hour claim. The exact dates when I did this work I cannot give, but it was done between the time I located the claim and the time I sold it out. In the bond for a deed made by Charles Mayger I took
38 a two-thirds interest in it—that is, the Nine Hour claim—and also the thirty-foot strip, and Huggins and Sterling had the other one-third. I think Mayger was to execute the deed to me—to me individually—but as the strip was a part of the Nine Hour Lode claim, of which they owned a third, they would be entitled to the same interest in the strip.

WARREN DE CAMP, a witness on behalf of the plaintiff, testified in substance as follows:

I reside at Lump City at present; my business is mining; have been engaged in it most of the time for seventeen years, principally at Marysville. I resided in the town of Marysville while mining there, and was acquainted with William Robinson and James Huggins. I met Huggins in the spring of 1878 and got acquainted with him, and with Robinson, I think, in 1880. I knew William Mayger and Charles Mayger; they resided in Marysville; and I am acquainted with the mining claims mentioned in the pleadings as the St. Louis and Nine Hour; have known them since their location; known the Nine Hour since 1880, and the St. Louis
39 since 1878. I examined the stakes of the St. Louis location and ascertained the position after the location of the Nine Hour, in the spring of 1881. I went over the ground and found out the position of the different stakes in order to find out the lines as I wanted to prospect and to locate ground adjoining these claims—that is, the St. Louis and Nine Hour. I ascertained it with reference to the location of the northwest and southwest corner stakes of the Nine Hour Lode claim.

Q. You may state how the lines of these respective claims run with reference to conflict?

Objected to for the reasons assigned to interrogatories propounded to Robinson, and for all the reasons hereinbefore stated.

A. My impression was at the time that there was no conflict. I did not run the lines out with an instrument, but I sighted through as a prospector usually does, on the different stakes, and I concluded that the St. Louis and the Nine Hour were not in conflict. I don't think there was anybody with me at the time. I located a claim in that vicinity and was interested in the Nine Hour at that time, and I am the Warren De Camp mentioned in some of these deeds. Judge Eddy and myself bought a one-twelfth interest.

40 By Mr. TOOLE: I think we will have it understood that these objections will all go in.

By the COURT: Some of these objections are entirely different from the main objection to be disposed.

By Mr. TOOLE: An objection, for instance, like this, your honor, as to what interest he conveyed or what property he conveyed, is additional to the main objection, for the reason that the deed itself is evidence of that fact.

By the COURT: There is no dispute about that.

By Mr. TOOLE: The answer expressly denies that the deeds of conveyance referred to or any of the mesne conveyances conveyed any title whatever to the thirty-foot strip, and it is for that reason that we object to the introduction of this oral testimony tending to show that fact, for the reason that ultimately they will be limited to the calls contained in their deed.

By the COURT: It will go in, then, under the general objection.

41 By Mr. CULLEN: Whether the deeds do or do not convey any interest is a legal question. As I stated in the opening, these deeds convey the Nine Hour lode, and we maintain they convey it all.

A. I obtained a working lease from William Robi-son of his interest that summer on the Nine Hour lead and proceeded to work it; sunk a shaft fifty feet deep, in company with James Huggins and my brother. This was in the year 1881. I was working on the ground at the time the survey was made of the St. Louis lode for a patent. It strikes me that we were at that time engaged in sinking that shaft.

By Mr. CULLEN:

Q. Now what, if anything, did you ascertain with reference to where they were running the easterly line of their St. Louis?

Objected to for the same reasons heretofore given.

A. They were running them out, as I thought, to take in part of the Nine Hour ground.

The line was run to within about twelve feet of the collar of the shaft, where I was at work.

Q. How did the line run there as compared with the line which you had previously examined as between the northeast and southeast corner stakes of the St. Louis?

Objected to for the same reason.

A. It was considerably up the hill and onto the Nine Hour ground. I cannot tell exactly the distance; just in the neighborhood of two hundred feet, I should think.

42 By Mr. TOOLE: I would like to add to those interrogatories and questions still another objection—*i. e.*, for the reason that the plaintiff claims title and asks a conveyance by reason of the title acquired by the St. Louis patent, and aided and assisted in procuring the same, and *are* estopped from denying any of the legitimate consequences resulting from said patent, among which are all of the

facts and things required to be done under the statutes of the United States and the State of Montana.

Which was allowed by the court.

By Mr. CULLEN:

Q. Now, Mr. De Camp, when you made your first examination of the stakes, or any subsequent examination that you made of the stakes of the St. Louis Company, I will get you to state if you particularly remember what sort of a stake was at the southeast corner of the claim.

Same objection and exception as heretofore, and for the reasons heretofore given.

A. The stakes set at the southeast corner of the St. Louis claim originally was a stake with a burnt end, burned end up, blazed on one or two sides, and the name "Southeast corner St. Louis mining claim" written. Subsequent to the survey I saw that stake; it was up three or four hundred feet above where it originally was; it was up near the east line of the Nine Hour, nearer the east line of the Nine Hour than to the west line; practically it crossed the
43 Nine Hour claim. I saw it soon after the survey was made, and we began tracing out the lines to see how the survey was being introduced.

By Mr. TOOLE: Let a minute be made that all of the questions coming within the purview of the objections heretofore made are deemed objected to upon the same grounds *grounds*, by consent of both parties and by leave of court.

Mr. Robinson was with me at the time we made this examination. Robinson took me up to the stakes. We examined the ground where the stake was set for the purpose of ascertaining when it had been set there. The stake was held up by a pile of rocks. On an examination of the rocks we found that they had been placed there lately. There was green grass under the rocks. There could not have been a stake there, or I would have seen it when I examined this Nine Hour claim, because I was around this Nine Hour claim and saw all of the other stakes, and it was near enough to the southeast corner of the Nine Hour—so near that I could not have missed it if it had been there. I recognize this map as showing about the way the claims lay. The position designated on the map as to where these stakes were is about right, as near as I can tell. The stake that stood there originally was a burned stake, burned end sticking up. I have stated where I saw it last. I never saw any stake at the point where the elbow is on the Compromise ground. I never saw any mark of any kind until the survey corner was
44 placed there; was not over the Nine Hour ground very frequently; have been up there several times, probably four or five times, in that vicinity. We had a dump on the Compromise ground; put in a shaft; no buildings, only the track, but I had a place fixed up here to dump the ore. I had a track that was on the Compromise ground, and a portion of the blacksmith's shop was on

that ground. I understood the way the lines ran; they ran right through the blacksmith's shop. There was the line from the original survey corner to the other survey corner—from 2 to 3. I did not run through with an instrument.

Q. What did you do with your interest in it?

Objected to for the reason that the deed would show.

By the COURT: I will reserve decision.

—. My interest was held jointly with Eddy, and we sold jointly to Messers. Sharpe and Atkinson.

The foregoing answer was objected to for the reason that the deed itself will show as to what ground was conveyed, and for the particular reason that the thirty-foot strip was not included in it, and the said parol testimony is an attempt to vary the calls of the deed.

45 Cross-examination:

I don't remember whether the location notice stated the direction that the east line of the St. Louis claim ran. I don't remember whether according to the location of the east line of the St. Louis claim there was any jogs or corner, as we call it here, at this mark No. 2 of the St. Louis claim. The notice on record which I have read does not call for any extra X corner. If the calls of the St. Louis location ran in a straight direction, without any jogs, the consequences would be that the location of the Nine Hour claim would be outside instead of inside of it. The end line of the Nine Hour as located lacked 159 feet of being parallel—that is, the end line of location at one end had to be pulled in one hundred and fifty-nine feet to make it parallel with the other end line.

The thirty-foot strip was always part of the Nine Hour Lode claim and never embraced in the St. Louis claim. While I was owner in it I worked in what is known as the Nine Hour shaft, on the discovery. It was the only shaft there is there. This shaft, however, is not on the thirty-foot strip. I never did any digging on the thirty-foot strip. I fixed an ore dump on it and built a track for an ore dump, but did not crib the lower side of it. This shaft that I worked upon is about ten or twelve feet from the east line of the thirty-foot strip. We sunk it fifty feet. My brother,
46 Ben De Camp, and Jim Huggins worked with me in the shaft referred to. While I worked there I knew nothing about the thirty-foot strip. I thought it belonged to the Nine Hour ground, and we dumped on the ground without any reference to anybody else's ground. This work was before the survey of the St. Louis. I don't remember how long the blacksmith shop remained on this ground. It was there when the survey was made, and I don't know at whose instance it was removed.

Redirect examination:

I built the track to which I have referred out west, at about right angles to the shaft, west from the shaft, down the hill about twenty-five feet.

WILLIAM MAYGER, called as witness on behalf of the plaintiff, testified as follows:

In April, 1893, I was in Helena attending to the lawsuit. At that time I was manager of the defendant company. About that date I received a letter from Mr. Bayliss, and I am satisfied the one you present to me is a copy of it, or at least the substance of it. I cannot say whether it is an exact copy or not. I have the letter, but have not it with me. The letter in substance was forbidding me to run a trench across this thirty-foot strip at the time. This was during the time that we were developing for the purposes of getting
47 evidence in this suit that was coming on. I don't know the exact date. I suppose that is a copy of what was handed to me by Mr. Whetmore; I believe it is.

By Mr. CULLEN: We have some record evidence which we will now offer. We will first offer the notice of location of the St. Louis lode.

By Mr. TOOLE: That is objected to for the reason that the St. Louis claim was passed to patent, which is conclusive evidence of the location of the claim, the discovery, the recordation, and possession, on account of which this is incompetent and immaterial.

(Here insert Exhibit 1 and Exhibit 2, admitted under objection of defendants.)

48 "THE ST. LOUIS LODE."

Notice of Location and Declaratory Statement of Discovery of a Claim to Quartz Lode Mining Claim.

St. Louis Lode mining claim, Ottawa mining (claim) district, Lewis and Clarke county, Montana Territory.

The undersigned, who is a citizen of the United States, hereby declares and gives notice to all persons concerned that he has discovered a vein or lode within the limits of the claim hereby located, and that he has this 28th day of September, A. D. 1878, located and do- hereby locate and claim, under and by virtue of the laws of the United States and of the Territory of Montana, a mining claim upon said lode or vein, to be designated and named the St. Louis Quartz Lode mining claim, extending along said vein or lode eight hundred feet in a northeasterly direction and seven hundred feet in a southwesterly direction from the center of the discovery shaft, where a similar notice is posted, and three hundred feet on each side from the middle or center of the said lode or vein at the surface, comprising in all fifteen hundred feet in length along said lode or vein and six hundred feet in width, with all the rights and privileges as surface ground and lodes, veins or lodes, within the boundaries of said claim and otherwise, and the metals, minerals, and valuable deposits of every kind contained in said veins, lodes, or ledges or within said boundaries which are given or allowed by the laws of the United

States aforesaid or of the Territory of Montana. The mining
49 claim hereby located is situated in Ottawa mining district, Lewis and Clarke county, Montana Territory. Said discovery shaft is about 900 feet in a southwesterly direction from a point of rocks rising about 15 feet above the ground, and upon the southwestern portion of the Drumm Lummon Lode mining claim, and about 1,500 feet easterly of Ottawa gulch, in above-written county and Territory. The adjoining claim is the Drum Lummon on the northeast. This location is distinctly marked on the ground, so that its boundaries can be readily traced by a stake set at discovery shaft this 28th day of September, A. D. 1878, and by substantial posts at each corner of the claim, and the exterior boundaries of the claim, as marked by said posts, are as follows, to wit: Beginning at a post set at discovery shaft, marked A, thence running in a northeasterly direction eight hundred feet, to a post marked B; thence northwesterly 300 feet, to a post marked D; thence southwesterly 1,500 feet, to a post marked E; thence southeasterly three hundred feet, to a post marked F; thence, same course, three hundred feet, to a post marked G; thence northeasterly 1,500 feet, to a post marked C; thence three hundred feet northwesterly to post B. The undersigned intend to hold this claim under and according to the laws of the United States and of the Territory of Montana, and to record this notice and statement under oath in the county recorder's office of said county, as provided by law.

Dated this twenty-eighth day of September, A. D. 1878.

50 CHARLES MAYGER. [SEAL.]

Duly verified.

Filed for record October 12th, 1878, Book E of Lodes, page 261.

Also the location notice of the Nine Hour claim, which is marked Exhibit 3:

Declaratory Statement, 9 Hour Lode.

This lode is situated in Ottawa unorganized mining district, Lewis and Clarke county, Montana Territory, and about four thousand feet in a southerly direction from Cruse's mill, and for landmark a large point of rock coming above the surface of the ground about 1,500 feet in a southwesterly direction from discovery shaft. Discovered and located on the 20th day of July, A. D. 1880, by William Robinson and James Huggins, and hereby give notice that, having complied with the requirements of chapter 6, title 32, of the Revised Statutes of the United States, the local customs, laws, and regulations regarding the location of lode claims, have located 1,500 linear feet along the line of said Nine Hour lode, to wit, 750 feet in a northeasterly direction and 750 in a southwesterly direction from discovery shaft; at which said discovery is a stake firmly planted in the ground, upon which is written the name of the lode, name of location, date of location, and number of feet claimed, the exterior boundaries of said Nine Hour Lode claim being dis-
51 tinctly marked by stakes at each corner thereof, that its boundaries can be easily traced, to wit:

Commencing at the northeast center line stake, running 300 feet S. E., to stake marked S. E. corner Nine Hour lode, thence 1,500 feet southwesterly to stake marked S. W. corner 9 Hour lode; thence 300 feet N. W. to the S. W. center line stake; thence 200 feet N. W. to N. W. corner stake, marked N. W. corner 9 Hour lode; thence 1,500 feet northeasterly to stake marked N. E. corner 9 Hour lode; thence southeasterly 800 feet, to N. E. center line stake, marked 9 Hour lode, and place of beginning, embracing 1,500 feet in length with surface ground 300 feet on the southeasterly side of said lode from center of vein at the surface and 300 feet on the northwesterly side, or so much thereof as not to interfere with the location of the St. Louis Lode claim. Said lode is bounded southerly by said St. Louis lode. The interest- of the respective locators are as, namely: William Robinson, an undivided two-thirds interest, and James Huggins, an undivided one-third interest.

JAMES HUGGINS.

Duly verified.

Which was admitted under similar objection and exceptions.

JOHN HERRON, a witness on behalf of the plaintiff, testifies as follows:

52 I am surveyor of the plaintiff company. All papers referring to the ownership of land and property generally are filed with me and I am in charge of them.

By Mr. CULLEN: I desire here to offer a certified copy of a mortgage from James Huggings to William Robi-son, made on the 29th day of March, 1883.

Q. I will ask you if you made a search for the original of this instrument?

A. I searched through the company's records and did not find the original.

By Mr. TOOLE: I don't see what business the plaintiff would have with this mortgage under the circumstances. It is a mortgage given to William Robi-son.

By Mr. CULLEN: He is one of our predecessors in interest.

By Mr. TOOLE: What would the mortgage have to do with that?

By Mr. CULLEN: It is the beginning of our claim of title, so far as the Huggins title is concerned.

By Mr. TOOLE: We object to the mortgage, first, for the reason that any search made for plaintiff by plaintiff is of no conse-

53 quence, for there is no presumption of law nor proof that it ever had possession of it; secondly, because it is immaterial.

By the COURT: The general objection applies here, and then there is the special objection.

By Mr. TOOLE: Yes, sir; for the reason that it is utterly incompetent. First, it is a certified copy, and, secondly, there is no foundation laid for it. When proof is made of a search for an instrument, the presumption is that the search was made among the papers of the person who would properly have them in possession.

By the COURT (to Judge Cullen): Do you propose to follow this

up by showing that there was a foreclosure and a decree of foreclosure?

By Judge CULLEN: We commence with this, because this antedates the making of this bond for a deed, and Mr. Huggins has parted with his interest in this Nine Hour lode at a time when there was no conflict as to its being the Nine Hour lode—this compromise ground.

After argument by counsel the objection was passed for the present.

By Mr. CULLEN: We desire to introduce a mortgage from
54 Huggins to Sterling.

And the same search was established, as heretofore given with respect to this instrument, and the same objection made to its introduction.

Plaintiff then introduced in evidence, under objections of defendants, the following papers:

A mortgage from James Huggins to William Robinson, made on the 29th day of March, A. D. 1883, marked Plaintiff's Exhibit No. 4 (as follows):

James Huggins to William Robinson. } Mortg.

Dated March 29th 1883. James Huggins of Marysville, Montana, party of the first part; William Robinson of the same place, party of the second part; consideration, sum of one hundred dollars; property mortgaged: "one undivided one-sixth (1/6) interest in that certain lead lode or mining claim commonly known and recorded as the 'Nine Hour lode' or '9 Hour lode,' situated, lying and being in Lewis and Clarke county, Montana, and about 4,000 feet in a southerly direction from Cruse's mill (in Ottawa unorganized mining district) being bounded and described as follows: Commencing at the N. E. center stake, running 300 feet S. E. to stake marked S. E. cor. 9 Hour lode, thence 1,500 feet *to* S. W. to stake marked S. W. cor. 9 Hour lode, thence 300 feet N. W. to S. W. center line stake, thence 200 feet N. W. to N. W. cor. stake
55 marked N. W. cor. 9 Hour lode, thence 1,500 feet N. E. to stake marked N. E. cor. 9 Hour lode, thence S. E. 50 feet to place of beginning. For a more particular description and identification of said lode, reference is had to record of said lode in Book E of Lodes on page 457 of the records of Lewis and Clarke county, Montana, and made a part of this indenture. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining."

JAMES HUGGINS. [SEAL.]

In presence of—
JNO. W. EDDY.

Duly verified; duly recorded.

Mortgage from James Huggins to Frank P. Sterling, marked Plaintiff's Exhibit No. 5:

James Huggins of Marysville, Lewis and Clarke county, Montana, party of the first part, and Frank P. Sterling of Helena, Lewis and Clarke county, Montana, party of the second part; dated January 19th, 1883: consideration one hundred dollars: mortgaging "an undivided one-sixth (1/6) interest in and to the following-described quartz mining claim situated in Ottawa unorganized mining district, on what is known as 'Cruse'- *hill*' in Lewis and Clarke county,
Montana Territory, and known as the Nine Hour Lode min-
56 ing claim, located by William Robinson and James Huggins on the twenty-sixth day of July, A. D. 1880, and by them recorded in the office of the county clerk and recorder of the county of Lewis and Clarke aforesaid, on the seventh day of August A. D. 1880, in Book E of Lodes on pages 157 and 158 of the public records of said county to which record reference is hereby made for a fuller description of said Nine Hour lode. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining. This conveyance is intended as a mortgage to secure the payment of a certain promissory note" &c. * * *

JAMES HUGGINS. [SEAL.]

Signed, sealed, & delivered in presence of—
T. H. CARTER.

Duly acknowledged.
Duly filed and recorded January 19th, 1883.

A sheriff's deed for the same property, marked Exhibit 6:

Deed, David H. Churchill, sheriff of Lewis and Clarke county, Montana Territory, party of the first part, Massena Bullard and Charles A. Broadwater, of Helena, Montana Territory, parties of the second part; dated January 4th, 1886; consideration five hundred dollars; wherein said party of the first part, as such sheriff had granted, bargained, sold, conveyed, and confirmed and by these presents does grant, bargain, sell convey and confirm unto the said parties of the second part, their heirs and assigns forever the real
estate in said order of sale, described as follows, to wit: All
57 that certain undivided one-sixth of the quartz lode mining claim commonly known and recorded as the Nine Hour Lode mining claim and recorded in Book E of Lodes on page 457 of the records of Lewis and Clarke county, Montana, and more particularly bounded as follows: Commencing at the northeast corner line stake and running 300 feet S. E. to stake marked S. E. corner 9 Hour lode; thence 1,500 feet southwesterly to stake marked S. W. cor. 9 Hour lode; thence 300 feet N. W. to S. W. center line stake; thence 200 feet northwest to N. W. corner stake marked N. W. cor. 9 Hour lode; thence 1,500 feet northeasterly to stake marked N. E. cor. 9 Hour lode; thence southeasterly 50 feet to the northeast center line stake marked 9 Hour lode, and place of beginning, embracing 1,500

feet in length with surface ground 300 feet on the southeasterly side of said vein at the surface and 300 feet on the northwesterly side, or so much as does not interfere with the St. Louis Lode claim.

DAVID H. CHURCHILL. [SEAL.]

Duly acknowledged.
Duly filed and recorded January 8th, 1886.

A deed from Huggins to Sterling, which was marked Exhibit 7:

Deed, dated January 19, 1883, between James Huggins, of Lewis and Clarke county, Montana Territory, party of the first part,
58 and Frank P. Sterling, of Helena, Lewis and Clarke county, Montana Territory, party of the second part; consideration, one dollar; whereby party of the first part "does by these presents grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, an undivided one-twelfth (1_{12}) interest in and to the following-described quartz mining claim, situated in Ottawa unorganized mining district, on what is known as 'Cruse hill' in Lewis and Clarke county, Montana Territory, and known as the Nine Hour Lode mining claim, located by William Robinson and James Huggins on the twenty-sixth day of July, 1880, and by them recorded in the office of the county clerk and recorder of the county of Lewis and Clarke aforesaid on the 7th day of August, A. D. 1880, in Book 'E' of Lodes on page- 157 and 158 of the public records of said county to which record reference is here made as a part hereof, and for a more full description of said Nine Hour lode." * * *

JAMES HUGGINS. [SEAL.]

Duly acknowledged.
Duly filed and recorded January 19th, 1883.

It was here conceded that all these documents come under the objections heretofore made, and for the reason that they were incompetent and irrelevant, because they did not convey the property in controversy.

Also a deed from Huggins to De Camp, marked Exhibit 8:

59 Deed, made July 19th 1881, between James Huggins of Belmont, county of Lewis and Clarke, and Territory of Montana, party of the first part, and Warren De Camp of the same place, and John W. Eddy of Helena, of the county of Lewis & Clarke and Territory of Montana, parties of the second part: consideration, three hundred dollars; wherein said part- of the first part "has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said parties of the second part and to them or their heirs and assigns the undivided one-twelfth (1_{12}) of that certain lode mining claim, situated and being in unorganized mining district (known as Ottawa) in Lewis and Clarke county, Territory of Montana and about three thousand (3,000) feet in a

southerly direction from Cruse's mill next adjoining to and running parallel with the 'Saint. Louis' location and known and recorded as the 'Nine Hour' Lode claim, embracing fifteen hundred feet on the said 'Nine Hour' linear along the vein, with surface ground as stated and recorded, being the lode claim discovered and located on or about the 25th day of July A. D. 1880, by William Robinson and James Huggins and by them recorded in the office of the county recorder of said county on the 7th day of August A. D. 1880 in Book 'E' of Lodes on page 457 of the records of said county to which record reference is made as a part of this description." * * * (Mining deed.)

JAMES HUGGINS. [SEAL.]

60 Duly acknowledged.
Duly filed and recorded March 14th, 1884.

Also deed from Huggins to Robi-son, marked Exhibit 9:

Mining deed, dated March 15th, 1882, between James Huggins of the county of Lewis and Clarke, and Montana Territory, party of the first part, and William Robinson of the same place, party of the second part; consideration, one dollar and other valuable considerations, whereby said party of the first part "had granted, bargained, sold, remised, released and forever quitclaimed and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part and to his heirs and assigns all of the following-described property to wit: Being the undivided two-thirds of that certain quartz lode situated in Ottawa mining district, county of Lewis & Clarke and Territory of Montana, known and located as the 'Nine Hour' lode and for a more particular description of said lode claim, reference is hereby made to the location of the same, as recorded in the recorder's office of the said county of Lewis and Clarke."

JAMES HUGGINS. [SEAL.]

Duly acknowledged.
Duly filed and recorded March 11th, 1882.

Also deed from Sterling to Eddy, marked Exhibit 10:

Mining deed, dated November 17th, 1884, between Frank P. Sterling and (Florence L. Sterling, his wife) of the city of Helena, county of Lewis and Clarke, and Territory of Montana, parties of the first part, and John W. Eddy, of the same place, the party of the
61 second part; consideration, four hundred dollars; whereby said parties of the first part "have remised, released and forever quitclaimed and by these presents do remise, release and forever quitclaim unto the said party of the second part and to his heirs and assigns, the undivided one twelfth ($\frac{1}{12}$) interest in and to that certain lead, lode of mining claim known as the 9 Hour Lode mining claim, situate, lying and being in unorganized mining district, Lewis and Clarke county, Montana, and recorded in the county recorder's

office of Lewis and Clarke county, August 7th, 1880, at 6 o'clock p. m. in Book 'E' of Lodes page 457, reference to which is had for a more particular description of said lode."

FRANK P. STERLING. [SEAL.]
FLORENCE L. STERLING. [SEAL.]

Duly acknowledged.
Duly filed and recorded November 18th, 1884.

Also deed from Eddy to Sharpe, marked Exhibit 11:

Mining deed, dated November 17th, 1884, between John W. Eddy, and Evelyn M. Eddy his wife, of Helena, Lewis and Clarke county, Montana, the parties of the first part, and Ebenezer Sharpe of the same place, the party of the second part: consideration, four hundred dollars: whereby parties of the first part "have remised, released and forever quitclaimed, and by these presents do remise, release and forever quitclaim unto the said party of the second part and to his heirs and assigns an undivided one-twelfth ($\frac{1}{12}$) of the lead, lode or quartz mining claim known as the 9 Hour Lode mining claim,
62 located in unorganized mining district, Lewis and Clarke county, Montana, and recorded in the county recorder's office of Lewis and Clarke county, August 7th, 1880, at 6 o'clock p. m. in Book "E" of Lodes page 457, reference to which is had for a more particular description of said lode mining claim."
* * *

JOHN W. EDDY. [SEAL.]
EVELYN M. EDDY. [SEAL.]

Duly acknowledged.
Duly filed and recorded November 18th, 1884.

Also a deed from Robinson to Sharpe, marked Exhibit 12:

Mining deed, dated January 24th, 1885; between William Robinson of Marysville, Lewis and Clarke county, Montana, party of the first part, and Ebenezer Sharpe, and Stephen E. Atkinson, of Helena, county and Territory aforesaid, the parties of the second part: consideration, four hundred dollars; whereby the party of the first part "has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said parties of the second part, and to their heirs and assigns an undivided one-sixth ($\frac{1}{6}$) of the quartz lode mining claim, commonly known and recorded as the '9 Hour lode' situate in Ottawa unorganized mining district, Lewis and Clarke county, Montana, located by the party of the first part and one James Huggins, July 26th, 1880, and recorded in the office of the county recorder of Lewis and Clarke county in Book 'E' of Lodes page 457, reference to which is had for a more particular description of the said lode mining claim." * * *
63 WILLIAM ROBINSON. [SEAL.]

Duly verified.
Duly filed and recorded January 24th, A. D. 1885.

Also a deed from Sharpe to Broadwarter, marked Exhibit 13.

Quitclaim deed, dated 12th day of March, 1885, between Ebenezer Sharpe and Francis A., his wife, of Helena, Lewis and Clarke county, Territory of Montana, parties of the first part, and Charles A. Broadwater, of the same place, the party of the second part; consideration, five hundred dollars; whereby the parties of the first part "do by these presents demise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, all *those* certain lot, piece or parcel of land, situated in the said county of Lewis and Clarke, Territory of Montana, and bounded and particularly described as follows to wit: The undivided two-twelfths ($\frac{2}{12}$) of that certain lead, lode, or quartz mining claim, known and recorded as the 9 Hour Lode mining claim, located in unorganized mining district, Lewis and Clarke county, Montana Territory, recorded in the county recorder's office of Lewis and Clarke county, August 7th, 1880, in Book 'E' of Lodes page 457, being the same premises conveyed by John W. Eddy and wife to E. Sharpe by deed, dated November 7th, 1884." * * *

EBENEZER SHARPE. [SEAL]
FRANCIS A. SHARPE. [SEAL]

Duly acknowledged.
Duly filed and recorded March 16th, 1885.

64 Also a deed from Robinson to Eddy, marked Exhibit 14.

Mining deed, dated 13th day of January, 1886, between *between* William Robinson of Helena, Lewis and Clarke county, Montana, the party of the first part, and John W. Eddy, Stephen E. Atkinson, Massena Bullard and Charles A. Broadwater of the same place, the parties of the second part; consideration, one dollar; whereby the said party of the first part "has remised, released and forever quitclaimed, and by these presents does remise, release and forever quitclaim unto the said parties of the second part and to their heirs and assigns an undivided interest in that certain quartz lode mining claim known and recorded as the Nine (9) Hour Quartz Lode mining claim, being survey lot 63, survey 1705, T. 11 N. R. 6 W. principle base line and meridian of Montana, as follows: To the said John W. Eddy, one-twenty-fourth, undivided, to the said Massena Bullard, two-twenty-fourths, undivided, to the said Stephen E. Atkinson, three-twenty-fourths, undivided, to the said Charles A. Broadwater, six-twenty-fourths, of the said Nine (9) Hour Lode mining claim. This deed is made by the party of the first part to these several parties of the second part hereto for the purpose of correcting errors in the records heretofore made, and this indenture is intended to leave twelve-twenty-fourths or one-half of this said claim in the name of the aforesaid William Robinson, and the other twelve-twenty-fourths or one-half in the names of the said parties of
65 the second part as above written."

WILLIAM ROBINSON. [SEAL]

Duly acknowledged.
Duly filed and recorded Jan. 15th, A. D. 1886.

Also deed from Broadwater to Sharpe, marked Exhibit 15:

Deed of mining claim, dated 30th day of March, 1886, between Charles A. Broadwater and Julia Broadwater, his wife, of the city of Helena, Montana Territory, parties of the first part, and Ebenezer Sharpe of the same place, the party of the second part; consideration, five thousand dollars; whereby the parties of the first part "have remised, released, and forever quitclaimed and by these presents do remise, release and forever quitclaim unto the said party of the second part, and to their heirs and assigns, the undivided one-fourth of that certain quartz lode mining claim, situated, lying and being in Ottawa (unorganized) mining district, in the county of Lewis and Clarke, Montana Territory, commonly known and called the '9 Hour lode' under which said name the same is recorded in Book 'E' of Lodes, of the records of said Lewis and Clarke county, on page 457 thereof, to wit; said reference is hereby made for greater particularity of description, the said mining claim being also described in the records of the surveyor general of said Territory of Montana, and in the application for an United States patent
66 for said mining claim, as lot numbered sixty-three (63) of township numbered eleven (11) north of range numbered six (6), west of the principal meridian of said Montana Territory."

C. A. BROADWATER. [SEAL.]
JULIA BROADWATER. [SEAL.]

Duly acknowledged.
Duly filed and recorded April 1, A. D. 1886.

Also deed from Sharpe to Bratnober, marked Exhibit 16:

Warrenty deed, dated 30th day of March, 1886, between Ebenezer Sharpe and Francis Sharpe, his wife, John W. Eddy and Evelyn Eddy, his wife, Massena Bullard and Laura E. Bullard, his wife, and Stephen E. Atkinson, all of Helena, M. T., parties of the first part, and Henry Bratnober of Marysville, M. T., party of the second part, consideration ten thousand dollars; whereby the parties of the first part, "do by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever, the undivided one-half of all and singular that certain quartz mining claim situate, in Ottawa (unorganized) mining district, in the county of Lewis and Clarke, M. T., commonly known and called 'Nine Hour lode' under which said name the same was recorded in Book E of Lodes, on page 457 of the records of said Lewis and Clarke county, and to which record refer-
67 ence is hereby made for greater particularity of description, said lode mining claim is also described in the records of the surveyor general's office for said Territory of Montana, and in the application for an U. S. patent therefor, as lot numbered sixty-three (63) of township numbered eleven (11) north of range numbered six (6), west.

The above-described premises are owned and the grantors herein respectively convey the same as follows, to wit: The said Ebenezer

Sharpe owns and hereby conveys the undivided one-fourth (¼), the said Atkinson conveys a one-eight- (⅛), the said Bullard the one-twelfth ($\frac{1}{12}$) and the said Eddy the one-twenty-fourth ($\frac{1}{24}$) of said Nine Hour Lode mining claim, each of said interests being undivided."

EBENEZER SHARPE. [SEAL]
FRANCIS W. SHARPE. [SEAL]
JOHN W. EDDY. [SEAL]
EVELYN M. EDDY. [SEAL]
MASSENA BULLARD. [SEAL]
LAURA E. BULLARD. [SEAL]
STEPHEN E. ATKINSON. [SEAL]

Duly acknowledged.
Duly filed and recorded April 3, 1886.

68 Also deed from Robinson to Bratnober, which is marked Exhibit 17:

Warranty deed, dated 5th day of March, 1886, between William Robinson, of Marysville, Lewis and Clarke county, Montana Territory, party of the first part, and Henry Bratnober, of the same place, the party of the second part, consideration seven thousand five hundred dollars; whereby the party of the first part "does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever, the undivided one-half interest in the Nine Hour Lode mining claim situate in the Ottawa mining district, Lewis and Clarke county, Montana Territory, the same being more particularly described, on the records of the office of the surveyor general of Montana Territory as the lot numbered sixty-three (63) in the township eleven (11) north range six (6) W., of principal base line and meridian of Montana Territory."

WILLIAM ROBINSON. [SEAL]

Duly acknowledged.
Duly filed and recorded March 9, 1886.

Which said several instruments were objected to by the defendants, for the reasons hereinbefore mentioned, at the time they were so offered, as to being incompetent and irrelevant, and for the reason that the entry of the said thirty-foot strip and patenting of
69 the same was made to the St. Louis Lode claim, and not to the said Nine Hour Lode claim.

Counsel for plaintiff then offered in evidence an assignment of the bond in controversy.

By Mr. TOOLE: Here is what purports to be an assignment by William Robinson of the bond in suit. We object to it, first, because for the reason that such a bond is not assignable, in that it was executed to James Huggins, William Robinson, and Frank P. Sterling, and that the assignment of William Robinson does not therefore effectuate and assignment of any interest in the bond; secondly, the said bond was executed, according to the allegations

of the complaint, to William Robinson, for the benefit of the beneficiaries mentioned in said bond, and he thereby became a trustee and could not assign such interest in said bond so as to authorize a court to compel a conveyance to any third person; and for the further reason that, according to the allegations of the complaint, plaintiff has succeeded, by mesne conveyances, to the title of the property referred to in said bond.

Said assignment was marked Exhibit 18 for plaintiff.

(Here insert said assignment.)

70 Know all men by these presents that I, the within-named William Robinson, in consideration of five dollars to me paid by Rawlingson T. Bayliss, the receipt whereof I do hereby acknowledge, do hereby sell and assign unto the said Rawlingson T. Bayliss, his heirs, administrators and assigns, all my right, title and interest, beneficial and otherwise, in or to a certain deed or bond executed on the seventh day of March, A. D. one thousand eight hundred and eighty-four, between Charles Mayger, of the one part, and William Robinson, James Huggins, and Frank P. Sterling of the other part, and which deed is filed for record in the office of the county recorder of Lewis and Clarke county, Montana Territory, on the eighth day of March, one thousand eight hundred and eighty-four.

In testimony whereof, I have hereunto set my hand and seal this tenth day of May, one thousand eight hundred and eighty-eight.

WILLIAM ROBINSON.

Duly acknowledged.

Duly filed and recorded April 24, A. D. 1888.

Under objections heretofore made to deeds, plaintiff then offered in evidence the deeds from De Camp to Atkinson, marked Exhibit XIX for plaintiff:

71 Mining deed, dated the 24th day of January, 1885, between Warren De Camp of Marysville, Lewis and Clarke county, Montana, first party, and Stephen E. Atkinson, of county and Territory aforesaid, second party, consideration, one hundred and fifty dollars; whereby first party "has granted, bargained, sold, remised, released and forever quitclaimed, and by these presents, does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, and to his heirs and assigns, an undivided one-twenty-fourth ($\frac{1}{24}$) of the quartz lode mining claim commonly known and recorded as the '9 Hour lode' situate in Ottawa unorganized mining district Lewis and Clarke county, Montana, located by William Robi-son and James Huggins, July 26th, 1880, and recorded in the office of the county recorder of said Lewis and Clarke county in Book 'E' of Lodes page 457, reference to which is had for a more complete description of the said lode mining claim."

WARREN DE CAMP. [SEAL.]

Duly acknowledged.

Duly filed and recorded January 24th, 1885.

Also a deed from Bratnober to Bayliss and marked Exhibit 20 for plaintiff:

Deed of mining claim, dated 19th day of May, 1887, between Henry Bratnober of Lewis and Clarke county, Montana Territory, party of the first part, and Rawlinson T. Bayliss, of the same place, party of the second part, consideration, twenty thousand dol-
72 lars: whereby first party "has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents, does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, and to his heirs and assigns that certain quartz lode mining claim, situate in Ottawa (unorganized) mining district, in the county of Lewis and Clarke county, Montana Territory, called the '9 Hour lode' the same being numbered lot sixty-three (63) of township numbered eleven (11), north of range numbered six (6), west, according to the United States Government survey thereof.

Also that certain other quartz mining claim situate in the district county and Territory aforesaid, known as the Maskel-n lode, being the same lode located by one John M. Whitehill April 5th, 188- and recorded in Book 'G' of Lodes page- two hundred and twenty-two (222) and two hundred and twenty-three (223) of the records of said county of Lewis and Clarke: and also the Maskelyn Mill site the same being bounded and described as follows, to wit: Beginning at the northwest corner numbered one (1) which is also corner numbered eight, survey numbered thirteen hundred and fourteen (1314) placer claim of John and Henry Books; thence south twenty-two degrees thirty minutes west, two hundred and fifty feet to the southwest corner numbered two; thence south sixty-seven degrees thirty minutes east, eight hundred and seventy-one and two-tenths feet to the southeast corner, numbered three; thence north twenty-
73 two degrees thirty minutes east, two hundred and fifty feet to the northeast corner, numbered four; thence north sixty-seven degrees thirty minutes west along south side line of survey numbered thirteen hundred and fourteen to corner numbered one.

HENRY BRATNOBER. [SEAL]

Duly acknowledged.

Duly filed and recorded 21st day of May, 1887.

Also deed from R. T. Bayliss to Montana Company, Limited, which was marked Exhibit 21 for plaintiff:

Mining deed, dated 24th day of January, 1890, between Rawlinson T. Bayliss and Marie Bayliss, his wife, of Lewis and Clarke county, Montana, first parties, and the Montana Company (Limited) a corporation, party of the second part; consideration five dollars, whereby first parties, "have granted, bargained, sold, remised, released and forever quitclaimed, and by these presents do grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part, its legal representatives or assigns all and singular the following-described real estate and quartz lode mining claims, the whole thereof being situate in Ottawa (unorganized)

mining district, in the county of Lewis and Clarke, State of Montana, to wit:"

"Also that certain orther quartz lode mining claim called the Nine Hour Lode claim, the same being designated in the United States patent therefor as lot numbered 63 of the township
74 and range last aforesaid and survey numbered 1705, the property thereby conveyed or intended so to be being the same conveyed to the above-named grantor by Henry Bratnober, by deed, dated May 19, 1887, and recorded in Book 9 of Deeds, p. 521, in the office of the recorder of said Lewis and Clarke county, to which reference is hereby made for a greater certainty of description."

RAWLINSON T. BAYLISS.
MARIE BAYLISS.

Duly acknowledged.
Duly filed and recorded 6th day of March, 1890.

Also deed from Montana Company (Limited) to Montana Mining Company (Limited), which was marked Exhibit 22 for plaintiff:

Mining deed, dated 27th day of July, 1893, between Montana Company (Limited), a corporation, and Francis Wil-iam Pixley, of London, England, by Rawlinson T. Bayliss, their attorney-in-fact, first parties, and the Montana Mining Company (Limited), a corporation, &c. party of the second part; consideration six hundred and sixty thousand pounds sterling; whereby parties of the first part "have granted, bargained, sold, remised, released and forever quitclaimed and by these presents do grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part and to its successors and assigns forever, all and singular those certain quartz lode mining claims, mill sites, and premises situate,
75 lying and being near the town of Marysville, in the county of Lewis and Clarke, State of Montana, more particularly described as follows, to wit:

"Also that certain other lode mining claim, known and called the 9 Hour Lode mining claim, the same being designated in the United States patent therefor as lot No. sixty-three (63) of township eleven, north of range six west, and designated in the records of said surveyor general's office as survey No. 1705."

THE MONTANA COMPANY (LIMITED) AND
FRANCIS WILLIAM PIXLEY,
The Liquidator Thereof,
By RAWLINSON TENNANT BAYLISS,
Their Attorney-in-fact.

Duly acknowledged.
Duly filed and recorded July 27th, 1893.

To all of which deeds the objection- heretofore made thereto were preserved, and exceptions to be allowed according to the ruling of the court upon the admission or rejection of the same or any of the foregoing documentary evidence.

Plaintiff also offered in evidence the patent for the Nine Hour Lode claim, marked Exhibit 23 for plaintiff:

Patent—Conveys.

"Whereas, in pursuance of the provisions of the Revised Statutes of the United States, chapter six, title thirty-two and legislation supplemental thereto, there has been deposited in the General Land Office of the United States, the plat and field-notes of survey
76 and certificate, No. 1357, of the register of the land office at Helena, in the Territory of Montana, accompanied by other evidence, whereby it appear- that, Charles A. Broadwater, William Robi-son, Stephen E. Atkinson, Massena Bullard, and John W. Eddy did, on the twenty-fourth day of March, A. D. 1886, duly enter and pay for that certain mining claim or premises, known as the Nine Hour Lode mining claim, designated by the surveyor general as lot No. 63, embracing a portion of township eleven, north of range six west of the principal meridian, in the Ottawa (unorganized) mining district, in the county of Lewis and Clarke, and Territory of Montana, in the district of lands subject to sale at Helena, and bounded, described and platted as follows, with magnetic variation nineteen degrees east.

Beginning at corner No. 1 a slate stone 33 x 15 x 9 inches, marked 1—1705, with mound of rocks alongside, from which a pine tree nine inches in diameter marked B. T. 1—1705, bears south seventy-seven degrees west thirty-nine feet distant; a pine tree twelve inches in diameter marked B. T. 1—1705, bears south three degrees west twenty-five feet distant, and the quarter-section corner on north boundary of section one, in township eleven north of range six west of the principal meridian bears north fifty-three degrees and fourteen minutes east six hundred and fifty and seven-tenths feet distant.

Thence, first course, south sixty-two degrees and thirty minutes east three hundred and twenty-six and four-tenths feet to corner No. 2, a slate rock 20 x 12 x 6 inches, marked 2—1705 a mound of rock alongside.

77 Thence, second course, south thirty-three degrees and fifty-two minutes west one thousand four hundred and twenty and eight'-three-hundredths feet to corner No. 3, a slate rock 22 x 14 x 12 inches marked 3—1705, a mound of rock alongside, from which the location corner bears south thirty-three degrees and fifty-two minutes west one hundred and fifty-nine feet distant.

Thence, third course, north sixty-two degrees and thirty minutes west four hundred and thirty-eight and five-tenths feet to corner No. 4, a slate rock 20 x 12 x 9 inches, marked 4,—1705, a mound of rock alongside.

Thence, fourth course, north thirty-eight degrees and nineteen minutes east four hundred and ninety-three and six-tenths feet intersect the southwest end line of survey No. 1089, the St. Louis Lode claim from which corner No. 3 of said claim bears south forth five degrees and thirty minutes east sixty-eight and five-tenths feet distant; six hundred and sixty and six-tenths feet to a point from which discovery shaft bears south seventy-two degrees east one hun-

dred and forty feet distant; one thousand four hundred and one and six-hundredths feet intersect the east side line of said survey No. 1089, from which corner No. 2 of said claim bears south twenty-one degrees and fifteen minutes west five hundred and forty-five and fifty-eight-hundredths feet distant; one thousand four hundred and thirty-seven and six-tenths feet to corner No. 1, the
78 place of beginning, expressly excepting and excluding from these presents all that portion of the ground hereinbefore described, embraced in said mining claim or survey No. 1089, and also all that portion of said Nine Hour vein of lode and of all veins, lodes, ledges, throughout their entire depth, the tops or apexes of which lie inside of such excluded ground; said lot No. 63, extending one thousand four hundred and twenty and eighty-three-hundredths feet in length along said Nine Hour vein or lode, the granted premises in said lot, containing ten acres and forty-two-hundredths of an acre of land, more or less, as represented by yellow shading in the following plat."

Duly executed, filed, and recorded in the General Land Office and office of county clerk and recorder of Lewis and Clarke county, Montana.

Also the original bond upon which this suit is instituted, which was marked Exhibit 24 for plaintiff:

"Know all men by these presents, that I, Charles Mayger, am held and firmly bound unto William Robi-son and James Huggins and Frank P. Sterling, in the sum of fifteen hundred dollars, for the payment of which well and truly to be made, I hereby bind myself, my heirs, executors, administrators and assigns firmly by these presents.

Sealed with my seal and dated this 7th day of March, A. D. 1884.

79 The condition of this obligation is such, that whereas, a certain cause now depending in the district court of the 3rd judicial district, Lewis and Clarke county, Montana, between Wm. Robi-son and James Huggins, plaintiffs, and Charles Mayger, defendant, has been compromised and settled, and the said Wm. Robi-son and James Huggins have agreed to withdraw certain objections to the application of the said Charles Mayger for patent now pending in the United States land office at Helena, Montana, now then, in consideration thereof, and the further consideration of one dollar to the said Charles Mayger in hand paid by the said William Robi-son and James Huggins and Frank P. Sterling, the receipt of which is hereby confessed, hereby covenants, promises and agrees to proceed at once upon his application now pending in the United States land office at Helena, M. T., for a patent to the St. Louis Lode claim described therein, and situate in Lewis and Clarke county, Montana Territory, and procure as soon as practicable a Government patent therefor, and when such title shall have been procured according to said application, said Charles Mayger hereby covenants, promises and agrees upon the demand of the said William Robi-son and James Huggins and Frank P. Sterling, or

heir, heirs, or assigns, to make execute and deliver to the said William Robi-son, *their* heirs or assigns, a good and sufficient deed of conveyance of that certain lot, piece or parcel of mining ground situate in Lewis and Clarke county, Montana Territory, and comprising a part of two certain quartz lode mining claims known
80 as the "St. Louis Lode claim" and the "Nine Hour Lode claim" and particularly described as follows, to wit: Commencing at a point from which the center of the discovery shaft of the Nine Hour lode bears S. 39 degrees 32 minutes E., said course being at right angles to the boundary line of the St. Louis lode between corners 2 and 3 fifty feet distant, thence N. 60 degrees, 28′ E. on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners 2 and 3, 226 feet to a point on the boundary line of the St. Louis lode between cors. one and two, thence south 20 degrees, 28′ W. along said boundary between corners one and two, 60.5 feet to cor. No. 2, of St. Louis lode, 400.31 ft. to cor. No. 3, of St. Louis lode, thence N. 46 degrees 10′ W. along the line of boundary of St. Louis lode, between cors. 3 & 4, 30 ft. to a point, thence N. 50 degrees 28′ E. along a line parallel to the boundary line of the St. Louis lode between cors. 2 & 3, 230 ft. to the point of beginning, including an area of about 12,844.50 sq. ft. together with all mineral contained therein. And if the said Charles Mayger, his heirs or assigns, shall make, execute and deliver the said deed of conveyance as by this agreement promised and intended, then this bond and agreement to be null and void otherwise to be and remain in full force and effect.

Witness my hand and seal the day and year first above written.

CHARLES MAYGER. [SEAL]

81 The name of Frank P. Sterling was inserted in this instrument as one of the obligees before the signing and delivery thereof.

CHARLES F. MAYGER. [SEAL]

Duly acknowleged.
Duly filed and recorded March 8th, 1884.

Defendants ask here, for the pu-poses of not incumbering the record with immaterial matters, that the respective deeds referred to be limited in the record to the grantors and grantees therein named and the description contained of the property in controversy in this action.

ALEXANDER BURRILL, a witness on behalf of plaintiff, testified as follows:

I am mining superintendent of the Drum Lummon lode, and reside in Marysville, and have resided there nearly eight years. I have been all over the mining claims very frequently, probably nearly over the entire property once a week. I am acquainted with William Mayger and Charles Mayger and have known them for about seven years. I have known the St. Louis Lode claim about three years. I know the Nine Hour Lode claim; it is among the

properties of the plaintiff; it lies east of the St. Louis; and I know the strip of ground in controversy, and first became acquainted with it in 1892. It was pointed out to me by George H. Robinson, who was then manager of the plaintiff company.

82 By Mr. TOOLE: The same objection to this testimony. We are willing to save it and have it go in subject to objection, unless it is made competent hereafter.

This ground was often shown me by Mr. Robinson in July, 1892; it was about the time the old buildings were being pulled off and the new ore-houses being built. I assisted. I was present when the old buildings were being removed. It was a shaft-house and blacksmith shop combined. There was a pole trestle west of this shaft-house or blacksmith shop and extended out east or south, rather east than south, along this strip of Compromise ground where the ore was conveyed to the dump. There were some stakes driven in along the toe of the dump or the bottom of the ore dump—that is, on the line of the two claims; it is not a foot either way; it may be a fact their ore dumped a few inches—I mean these stakes that held the planking that held the ore.

By Mr. TOOLE: What line do you mean, Mr. Burrill?
By Mr. BURRILL: On the west line, Compromise strip.

Q. At that time did you know where the lines of the Compromise strip were?
A. I did, as I was told by Mr. Robinson, and with the maps that were shown me by him as he located it.

83 By Mr. TOOLE:

We make the same objections to this as to the deeds.

Witness here pointed out on the map where the line of stakes was.

It runs west outside of the shaft-house and the blacksmith shop and then south to the extent of the dump. The trestle runs west from the shaft six or eight feet outside of the old building. These stakes and some planking were holding up the ore. The old houses were used for a shaft-house and a blacksmith shop; they were pulled off to make room for the new ore bin by Mr. Henley, the main superintendent for the Montana Company. There was an ore bin erected there to hold the ore high enough to load the wagons without shovelling. They loaded them through a chute. It stood partly on the Compromise strip and partly on the Nine Hour claim. There was a hoisting arrangement put up there that stood to the east of the shaft on the Nine Hour claim. There was an ore dump there when I first became acquainted with the Compromise strip. It was dumped on the Compromise ground lying west of the Nine Hour shaft, and is about ten or twelve feet distant from the east line of the Compromise ground. The ore was taken to the Montana Company mills and milled in 1892—July, I think. The old buildings were being torn down at that time. The Messrs.

Mayger were on the hill frequently about that time, I think. They were in Marysville.

84 By Mr. CULLEN: How far is Marysville from these mines, the Compromise ground particularly?

A. Probably about three thousand feet. They made no objection to what was being done that I heard of. I have seen persons digging in this Compromise strip besides employees of the Montana Company. In April, 1893, in making my rounds I found a man cutting an open trench. His name was John Paton. I asked him what right he had on that ground. I had a conversation with Mr. Charles Mayger at the incline shaft of the St. Louis Company. I notified Mr. Mayger to take that man off that ground; that he had no right there that I knew of; he said nothing about whom the man was working for. I did not get any satisfaction out of him whatever, and I reported the circumstances to Mr. Bayliss.

By Mr. TOOLE: We move to strike out all that testimony as immaterial; it is given for the purpose of establishing a title to the property, and the forbidding of a man working upon the same is not competent evidence of such title.

Which said motion was denied by the court, and to which ruling of the court defendants then & there duly excepted.

84½ At this time the St. Louis Mining Co. was sinking what is known as their apex shaft No. 2. The man who was doing the work struck his pick over the line into the Compromise ground before I made any objection; this was about the 2nd or 3rd of June 1893. Mr. William Mayger and Charles Mayger were not there and I objected to the work being done, and the man employed got out of the hole and went and got Mr. William Mayger and Charles Mayger and brought them up there, and Mr. William Mayger inquired of me where the Compromise line was. I pointed out his stakes. He said, "All right;" and Mr. Charles Mayger, I think went down to the north corner of this Compromise and lined Mr. William Mayger in with the work that was being done on the apex shaft No. 2. This was probably the 6th of June, 1893. Mr. William Mayger and Mr. Charles Mayger put stakes on this side of this track and drew the line across and instructed their man not to go within six inches of that line. I mean west. Those instructions were carried out. There was one stake there. It was put there some time between April and July, 1893. The side line stakes one, two, three and four were put there before that time.

By Mr. TOOLE: At this time, your honor, both parties were claiming this strip, and neither proposed that the other should work it.

85 By the COURT: This bond is in evidence: what does that bond commence its description from?

By Mr. CULLEN: From this Nine Hour shaft. Those shafts are not on the map. Our apex shaft is not there, neither is the St. Louis apex shaft No. 2 there.

Witness here pointed out on the map about where these shafts would be.

By Mr. TOOLE: They would be west of the thirty-foot strip?

A. Yes, sir; they would be west; they would be west and north.

Here it was admitted by Mr. Toole that in 1893 Mr. Mayger staked out the lines of the thirty-foot strip for the purposes of ascertaining exactly where it was, that neither party would tresspass upon.

By the COURT: That was in 1893?

By Mr. TOOLE: Yes, sir.

It was conceded also that this thirty-foot strip comprised thirty feet in width across from the east line of the St. Louis lode as patented, so as to strike the east line at some point west of the jog in the same, whatever distance that would be.

86 Stakes were put on the west line of the Compromise and a cord drawn across from one stake to the other, so as to guide the men in work. They did not work over on the Compromise ground. Since I have been with the Montana Mining Company the Compromise strip has been used for dumping room and for storage of all kinds. We had a shaft sunk down here and a windlass on it and a platform to hold ore on that strip of ground near the west line. There were roads on the ground and a powder magazine. While we were at work on this ground the Maygers were in Marysville principally. They have not done anything on that ground since that time. They got permission to make another open cut. Aside from the permission given by the court, I think they made one open cut on it.

Q. What objection have they raised to you or to any other officer of the Montana Company, in your presence, against its occupation of that ground?

A. Never made any to them. I never heard of them making any. I never heard of them making any objection at all.

Q. When, so far as you know, did they first make any objection to the occupancy of this strip by the Montana Company?

A. I never heard them make any.

87 Cross-examination:

The first work I ever knew of plaintiff doing on this thirty-foot strip was in the year 1893.

JOHN HERRON, being called as a witness for the plaintiff, testified as follows:

I am a surveyor for the Montana Company, and have been engaged in the occupation of civil engineering for about fifteen years, and have been with the plaintiff company a few months more than two years. I went to work for them about the first of March, 1893, and was engaged in office work, drafting generally, for the first two or three months. I made maps of the mines and mining works for the use of the company and preparation of plans for the London office.

Q. Did you receive any information or instructions from the

manager of the company as to the preparation of those maps and plans?

A. I did; yes, sir.

Q. Who was the manager of the company?

A. Mr. George H. Robinson.

Q. Did the thirty-foot strip spoken of appear upon the plans which you send to the company?

A. Yes, sir.

88 By Mr. McCONNELL: Our objection goes to all that line of testimony.

By Mr. HUGHES: I think, your honor, that the authorities I cited and those contained in the opinions referred to cover the point fully. It is not necessary to read them further, if your honor understands our position. I wish to say that the mere question of the map would not of itself be of sufficient importance to call for this argument, but there is much more testimony and stronger testimony that will follow.

By the COURT: What do you expect to show—that by the direction of the management the map of this property was forwarded to the London office?

By Mr. HUGHES: Yes, sir; showing and including as a part of the Nine Hour claim this ground in question.

By the COURT: As the property of the Montana Company?

By Mr. HUGHES: Yes, sir. That the men in charge designated that as the property of the company and so had it mapped, and we expect to follow that by showing that on other maps as well. This begins at the time of Mr. Herron, who went there rather late, but the other maps go back to 1887.

89 By Mr. CULLEN: Of course, we claim that these are exactly within that limitation, to show what our predecessors in interest claimed.

By Judge McCONNELL: I understand your honor then allows this to be heard, subject to further discussion as to its admissibility?

By the COURT: Yes, sir.

JOHN HERRON, recalled for further direct examination, testified as follows:

I have testified that I was civil engineer of the plaintiff company and have been since the first of March, 1893. I had in my charge the maps and documents of the plaintiff company, and I have the map showing the property of the company.

Q. Will you produce these maps?

By Mr. TOOLE: We would like for counsel to state what the object of this is.

By Mr. KIRKPATRICK: Certainly; that object is to show that by the maps of the company, representing the extent of our

90 property, we included as property of the plaintiff the Nine Hour claim, and embraced as a part of it the thirty-foot strip, the Compromise strip. We wish to show it as a continuous declaration on the part of the plaintiff that they claimed this ground as a

part of their property. I understand it is not denied that the plaintiff is the owner of the Nine Hour claim. It is denied that the plaintiff owns this Compromise strip as a part of that claim, or, in other words, that it is a part. It is denied that the plaintiff or the plaintiff's grantors have been in possession of the strip, and it is denied even that they ever claimed title to it. Now, as showing that they did make a persistent continuous claim of title, I wish simply to introduce the maps before your honor as a declaration that they did claim it, not as proving title, but as proving the fact.

By Mr. TOOLE: Your honor, we desire to note an objection:

First. Because the complaint does not state facts sufficient to constitute a cause of action or authorize any equitable relief.

Second. Because the patents conceded by the pleadings are conclusive evidence of the claims and description of the claims.

91 Third. Because it is admitting the acts of the parties to establish a title in themselves, and manufacturing testimony to support their case, because it is a transaction between the agents of the same company, and for the additional reason that there is no authority shown on the part of the agents by their acts to bind the company either one way or the other, and consequently no mutuality in the transaction.

Q. Will you designate what those maps are, if you have them marked?

A. The first map is known as the large scale surface map, showing the mining claims in the Ottawa district. The legend on the right-hand side of the maps shows, as colored red, all that at that time was the property of the Montana Company, and the red line carried along the south line of Marble Heart claim and clear around the possessions of the company, including the Compromise ground as a part of the Montana Company. This map was made from the notes on it on the 15th day of March, 1887, by Mr. Robinson.

By Mr. TOOLE:

Q. You say the red includes that which belongs to the company?

A. Yes, sir. It shows there. It marks it "Contract ground."

By Mr. TOOLE: It is the same width as your side line all the way through. How are you going to make that comprise thirty

92 feet unless your line is thirty feet wide?

A. If you look closely, Mr. Toole, you will see a dotted line there.

Q. Yes; but I see that the red—pink line is the same width there that it is everywhere else.

Said map was marked Exhibit 25 for plaintiff.

(Here insert said map.)

By Mr. TOOLE: I would like to ask a question about that map. Did you make that map?

A. The one just exhibited?

Q. Yes, sir.

A. No, sir.

Q. Who made it?

A. The legend says it was made by Mr. Robinson.

Q. You don't know anything about it except that? All you know about it, then, is that this map was made by Mr. Robinson. Do you really know that?

A. I know that it is a part of the company's files, yes, sir.

By Judge KIRKPATRICK: The handwriting upon the map is that of Mr. Robinson. When I went there he was acting as the general manager of the company. I found that map there when I went there, along with the documents of the company, and it has been in my charge ever since.

93 By Mr. TOOLE: We have a statute in reference to public officers. There books and records are transmitted from one to the other they become competent evidence, and the presumptions are that they are official acts. But here are private acts of an individual in making a plat, and they have sought to introduce it here upon the ground that somebody else made it, and because it was found among the files of the Montana Company, Limited, it is authentic. Now, what evidence is there before this court that Mr Robinson ever made that entry upon that for the purpose of laying a claim to that property, or, if he did, that it is correct?

By Judge KIRKPATRICK: We have other testimony upon that point.

By the COURT: There might be some slight evidence. I don't for a moment say that any of this testimony is competent.

By Mr. TOOLE: It is a verbal declaration of this man Robinson that that property belongs to this company.

By Mr. TOOLE: If it is supplimented by proof, as Mr. Kirkpatrick says, it will put a different phase on it. Of course, I infinitely preferred that the whole matter be argued out in the beginning, but you gentlemen propose that everything should go in, and that then we should unravel it afterwards.

94

By Judge MCCONNELL: We have no evidence that this map was made at the time it was made.

By the COURT: It was found in the company's possession and I can conceive that it would be a slight circumstance for consideration.

Witness here produces the map.

This map is known as the sixty-foot-scale working map of the company.

By Mr. TOOLE: Your honor, it is understood that all these maps are going in under objection?

By the COURT: Yes, sir.

By the WITNESS: This map was turned over to me as the only working map that there was in the files of the company that was used as a working map on the south end of the mine. The working map is one in which the main surveys were completed from time to time, and the ordinary mine workings determined on it. It shows the surface lines of the south end of the mine. The com-

pany properties are shaded down and the thirty-foot strip
95 is shown and written right in between the westerly and easterly lines of that strip with the words "Contract—Compromise" ground belonging to the Montana Company, Limited. It is in Mr. Robinson's handwriting. This has been made from 1854 evidently until 1890—kept up to that date—and new surveys and works are added to it.

Said map was marked Exhibit 26 for the plaintiff.

There is another map—I have here a map, a map under order by Mr. Robinson, by himself, for Mr. Burrill, Mr. Burrill being at that time—taking the position of mine superintendent. It was made for his guidance. In that map the Compromise lines are not shown at all, but the boundaries of the Montana Company, Limited, are shown as running to the west line of the Compromise strip. The map is so shaded and marked. I made that tracing in 1893 and furnished it to Mr. Burrill.

Said map was marked Exhibit 27.

This map is known as the one-hundred-foot-scale map, which was kept up month to month until the trial of the suit two years ago, since which time little has been done upon it. I think nothing at all. I am not positive as to that, but the date on the map is January 1st, 1890, in which the ground itself, the Compromise strip, is shown, colored as belonging to the Montana Company.

Said map was marked Exhibit 28 for plaintiff.

There is another map I have here which does not show any
96 date. It is undoubtedly one of the earliest maps of the company from the surveys that have been kept up for several years. There is no shading there showing the boundaries of the claims, but the particular strip of ground in question is shown with the words "Bond, March 7, 1884." This map was passed over to me with the balance of them.

Said map was marked Exhibit 29 for plaintiff.

That is all of them. I am acquainted with the thirty-foot strip of ground and been upon it frequently. I first saw the ground in question on or about the 1st of March, 1893. There was an extension of the ore bin at the shaft-house; there was a powder magazine; there was two pieces of crib-work, one on each side of the ore bin, and some remains of old crib-work; one or two wagon roads. I have a map which shows these facts.

Map here produced by witness marked Exhibit 30 for plaintiff.

The ore bin on the westerly side of the shaft-house projected out over on this Compromise ground a distance of about ten feet. There were also two pieces of crib-work, one on each side, one twenty-three feet long and the other fifteen feet long, on each side of the ore bin, which extended north the entire width of the Compromise strip of ground; there was a powder magazine in here, which had an inside clear measurement of about four feet, probably six feet outside meas-

urement, altogether, on the line of the Compromise ground, and these roads which were in constant use at that time.

97 By Mr. TOOLE: What was this cribbing put up here for?

A. I don't know.

Q. Was not there a dump thrown in there from this shaft here?

A. At any time that I have ever seen it there was some waste inside of that cribbing.

Q. Was not that put there for the purpose of keeping it from falling down the hill there?

A. From covering the wagon road, I should say, yes.

Q. How wide is this wagon road?

A. Probably eight feet; in some places it is hardly wide enough to take a wagon; sometimes there is several feet to spare; people travel over that country wherever there is no obstruction.

By Mr. KIRKPATRICK: Now, you say that the cribbing was up there to keep the rock and refuse from falling over and obstructing the road?

A. I should judge so; that is what it did accomplish. I don't know who built this road here. I have reason to think that the Montana Company did it.

Q. You are asked whether you knew?

A. No, sir; I don't know.

By Mr. TOOLE: Don't you know that the St. Louis Company did it?

98 A. No; I don't. I know of work being done on what is called the apex shaft. Shortly after I entered the service of the Montana Company, Mr. Mayger commenced working, or was working at the time I went there, on the apex shaft. It was sunk to a depth of about eighteen feet, at which time a drift was run to the westerly line of the Compromise strip where it stopped. This shaft was about twenty feet westerly from the Compromise strip on the St. Louis ground. This was prior to the trying of the St. Louis case in April, 1893. I found the line of stakes set all the way from corner one of the St. Louis.

(Here witness showed it on the map.)

By Mr. TOOLE: We do not deny that in 1893 they measured off with a rope that line and staked it off there.

By the WITNESS: There is a line of stakes from corner one off the St. Louis to pretty near corner No. 2, at points averaging fifty feet apart, the entire distance. On surveying off the Compromise ground and turning off the westerly line to show the westerly boundary of the same, I found two stakes on that line, or rather one stake and one iron pin. The iron pin was at a point 60½ feet northeast of corner No. 2; in other words, at the point where the westerly — of the Compromise intersects the east side line of the St. Louis. The stake that I found I could designate best by saying it is at a point

99 near where the St. Louis now has made a hole through the surface. It is very nearly on the line of our Nine Hour shaft. These two stakes were found on the 31st of May, 1893. We set stakes there at that time. I staked out the entire line of that westerly

boundary of the Compromise—put up five stakes. They were round stakes—sawed off pieces of logging—probably four or four and a half inches in diameter, standing up eighteen or twenty inches above the ground.

By Mr. CULLEN: We desire to offer the maps used in the other trial.

Which were admitted without objection.

(Here insert maps offered.) Stricken out.

Cross-examination.

By Mr. TOOLE:

Q. Was there ever any work done on that thirty-foot strip of any kind or description until these stakes were put there since 1881, up to the 31st day of May, 1893?

A. Do you mean mining?

Q. Yes; of any kind or description, or anything else done on it.

A. I know that those buildings were erected on it. I know that these buildings were there when the controversy arose between the parties.

100 Q. They were there way back in 1881, so far as you know?

A. No; I can't say that. I know they were not.

Q. When were they put there?

A. The exact date I cannot give.

Q. When was the ore bin put there?

A. I cannot give the exact date.

Q. Was it in 1893?

A. It was after 1888.

Q. Well, wasn't it in 1893?

A. No, sir.

Q. Was it in 1892?

A. I don't know; it was not in 1893.

Q. Don't you know that it was put there in 1892; don't you know that?

A. From my knowledge, no, sir; I was not there, in the employ of the company, in 1892; not until 1893. I heard agents and superintendents of the company say that it was put there in 1892. I don't know of them ever putting anything else there prior to 1892 and since 1881. The only map made by myself is marked Exhibit 27.

Q. The knowledge that you got of those other maps and the reasons why this ground has been included in them you did not obtain of your own knowledge, but from what others have told you?

A. My answer to that would be from the maps themselves and from what I have been told; yes, sir. I don't know the reason

101 for them putting that on the maps, except what I have been told; no other reason. I made Exhibit 27 in March, 1893, and made it from tracings of other maps. I made it from tracings of maps made by other persons, with some changes. The changes I made were at the instance of Mr. George H. Robinson. They were not made from any surveys made by myself. All that mining work

on this map has been done by the St. Louis Company since April, 1893. Most of the work disclosed is done by the St. Louis Company since April, 1893. Not all the work done referred to was done for development purposes. I don't think that the erection of the ore bin of that crib-work or the building of these wagon roads were for that purpose.

Redirect examination:

Some work was done under an order of the court, and some without it, for the purposes of evidence in the then pending suit. The only change that I remember of that was made at the request of Mr. Robinson, in this map marked Exhibit 27, was to show that the Compromise ground was inside if the westerly lines of the Nine Hour, as shown on the map; in other words, to show it as Montana Company property.

Recross-examination:

Q. You say at one time Charley Mayger and other parties
102 were at work and had been in the apex shaft, and were running a cross-cut towards this thirty-foot strip of ground, and that when they got to the line they stopped there, did you?

A. No, sir; I did not say a cross-cut. I said a drift.

Q. Well, call it a drift. Now, at the time that this drift was being run and they stopped at this place that you speak of, who was prosecuting those works, Charles Mayger or the St. Louis Mining Co.

A. As to that I don't know; Charles Mayger was there apparently in charge of the works. It was done in April, 1893. I know that the thirty-foot strip had not been deeded to the St. Louis Mining Company at the time it stopped work at the line of the thirty-foot strip.

Redirect examination:

Q. What was the particular change with regard to the thirty-foot strip that you made upon the map, or was directed to make upon the map?

A. Well, it amounted to the elimination of what is known as the St. Louis side line between corners 2 and 3, and showing the westerly line of the Nine Hour as what is known as the westerly line of the Compromise. That was done in March, 1893, and is on map Exhibit 27.

103 ALEXANDER BURRILL, recalled, testified as follows:

I said, in answer to a question of Mr. Toole, that the certain work having been done on the Montana Company, Limited, on the thirty-foot strip in 1893; I wish to correct this, as it was in 1892.

Cross-examination:

The work that was done in 1892 was the removal of the old shaft-house and blacksmith shop and the erection of the new ones and removal of the ore dumps. I never measured to see how far the

new ore bin extended over on the Compromise strip. I first saw the old building that was removed in 1892 some time in the year 1888.

JAMES H. HENLEY, a witness on behalf of the plaintiff, testified as follows:

I live in Whitehall, Montana; my business is mining; have followed it for eighteen years; mined in gold, silver, lead, and copper—what is generally known as quartz mining; was in the employ of the Montana Mining Company (Limited), and commenced work for it on the 17th of September, 1889, and remained with it
104 until the 31st of March, 1893; knew the Maygers during my employment there and met them frequently; became acquainted with them shortly after coming to Marysville; don't know the date, but it was some time about the 17th of September. I am acquainted with the Compromise strip; became acquainted with it on the 18th of September, 1889, through George H. Robinson, assistant manager; he pointed out the lines to me.

Q. Can you designate on one of those maps, Mr. Henley, the line which he pointed out to you as the west line of the Montana Company's ground? You may indicate on the map, if you can, what he pointed out as the line on the Montana Company's ground on this map, Exhibit 1, as between it and the St. Louis.

Objected to for the reason that it can contribute nothing to establish the title of the plaintiff in this action, is hearsay, and incompetent for any purpose, and for the other reasons heretofore assigned.

A. The property was turned over to me on the 17th day of September, 1889. Mr. Robinson went over the surface, pointed out these boundaries, or rather the boundary lines, the different corners, the stakes, and along this line between the St. Louis and the Nine Hour from this point No. 1 up to the juncture of the Compromise strip, on that line, and then over towards corner No. 3. Just below there was a row of stakes set about every fifty feet from this point and through to here,
105 to the south end line. This was the 18th of September. The most of the stakes were rather a square stake, probably an inch or an inch and a half square, made out of planking. They varied in length; some of them six inches high, some of them eighteen inches or two feet. You could look along from stake to stake and trace out the line. Some time in the early part of 1892—I think it was the latter part of May or the 1st of June—I tore down the old buildings which were on the Compromise strip, the Nine Hour shaft, a portion of it being on the Compromise strip, and erected—nobody objected to it. The Maygers were at the time residing in Marysville, I believe. I erected a building for the hoisting engine, a portion of which was on the thirty-foot strip—that is, the ore bin which was attached to it was partly on it. There was an ore bin partly erected on the thirty-foot strip and the powder magazine and some cribbing and some roads on it. I had charge of the work. I could not answer how much of the ore bin was on the thirty-foot

trip. I should judge about eight or ten feet of it, but I never measured it. The structure from the ground to the top of the bin was about fourteen feet, and the length, I should judge, about eighteen or twenty feet, and I don't remember the width, but it was probably twelve feet. The roads were constructed partially by team—by plough to some extent, and shovelling dirt from the upper to the lower side. The character of the country there is hilly.

106 I don't know how long I was employed in doing this work, probably sixty days altogether, completing this whole structure, roads and everything and removing dump, working during the daytime. There was nothing to prevent this work from being seen from Marysville. During the sixty days that I was at work I saw Charley Mayger up there several times. I don't remember that I ever saw William Mayger up there during that time. No objection was made by any one to me. I had that cribbing put up there. (Here witness pointed out on the map where it was, etc.)

It was just ordinary, round the poles, laid up, interlaced with other poles running back into the bank. After this time I was furnished with a map by George H. Robinson. He made a map for me showing the underground workings and the boundaries of the claims on the surface, to guide me in my operations. It was a map on an hundred-foot scale, and this is the map.

By Mr. TOOLE: The same objection is interposed to this hearsay testimony as was heretofore made.

A. I am not sure this was a map furnished me, but it looks like it. There was an ore dump there on this ground in 1892. It was taken off and run through the Montana Company's mill. I had the ore removed. No objection was made to it.

107 Cross-examination:

Q. In speaking of the road you referred to, did it run through other country besides this thirty-foot strip?

A. Well, the portion that I built was not over the country, but it ran over the country. The road I built was probably 125 to 150 feet in length and was used for hauling ore. There were two roads. The first was used for hauling ore from the dump, which was removed to the mill. It was probably three-quarters of a mile from the dump to the mill. This road extended three-quarters of a mile—that is, the road I built—over divers and sundry claims. The cribbing I put there after the ore bin was constructed; it was put there to protect the road; that was the object of it. The road was put there for the purpose of working the mine to advantage, for the purposes of hauling ore to the mill, and the cribbing was put there to protect the road; it was done for that purpose. The ore bin was constructed under the directions of George H. Robinson, then manager. He told me to construct it there. I made no survey to ascertain whether the ore bin extended over onto the thirty-foot strip or not. It was done under Mr. Robinson's directions.

108 RAWLINSON T. BAYLISS, a witness on behalf of the plaintiff, testified:

I was the resident manager and director of the plaintiff company from 1884 until 1891, and resided during that time in Marysville. I was acquainted with George H. Robinson. He was mine surveyor and subsequently the assistant general manager, up to 1891, and then he became general manager on my leaving Marysville. During this time I was acquainted with the Maygers. Mr. Robinson left the employ of the company the 1st of April, 1893. I was acquainted with the Nine Hour Lode claim during that time and became acquainted with it in 1884, and subsequently purchased it in 1886. I bought one-half interest from William Robinson and a one-half interest from C. A. Broadwater.

Q. Now, at the time you purchased the interest from Mr. Robinson, you may state whether he showed you where the lines of his property were or not.

Objected to as immaterial and incompetent, for the reason that the calls contained in the deed will designate and describe the property, and they cannot be extended by parol testimony.

A. Yes, sir; he did. I had one or two interviews with him prior to the actual purchase, and he pointed out to me where the corner stakes were, and standing on his dump he showed me what
109 is now the west Compromise line, and standing on the dump said that his claim extended fifty feet from his shaft in a westerly direction.

Q. Now, subsequent to the purchase, who, if any one, made any claim to you for any portion of that ground that was pointed out to you?

Objected to as not being comprised within any of the issues in this case, and for the further reason that a failure to make any claim by any one cannot build up any title in the plaintiff to justify a decree in this kind of an action.

A. Nobody whatever. At the time he pointed this ground out to me as belonging to the plaintiff company there was a small shaft-house and a blacksmith shop attached to it, and a dump and a wagon road at the foot of the dump, I believe. They were torn down in 1892 by plaintiff company.

Q. Who, if any one, objected to or made any protest against their being torn down?

Objected to for the reasons heretofore stated.

A. Nobody. I don't know that there was anything at the time of the purchase defining what would be the west line of the Nine Hour lode, with the exception of Robinson's pointing out from his dump. Aside from that, nothing but the corner stakes of the claims, I presume—I mean the survey stakes. I think in 1888 it was, about the time I first became aware that it was probable that the Montana Company would have some controversy with the St. Louis

Company, and in order that we might be able to recognize
110 the boundary lines on the surface I instructed Mr. Robinson to run out the lines of small stakes along the east boundary line of the St. Louis claim and along the Compromise, what we called the west line of the Compromise ground, up to the south end line of the St. Louis, in order that when I went on the surface I might be able to identify the limits of our own property and the St. Louis Company's property.

By Mr. DIXON: This goes in under objection.

My recollection is that these stakes were set every fifty feet apart. They are about an inch and a half, maybe two inches, square. The old buildings that were on there remained until 1892. They were then pulled down by plaintiff company. It was decided to sink the old Nine Hour shaft to a connection with our workings below, and for that purpose a new shaft-house was erected, together with the ore bin attached to it, and the ore bin was partly erected on the Compromise ground. There was a powder magazine put on the Compromise ground and certain roads constructed, cribbing put up to hold back any waste that might get in the shaft, and generally the Compromise ground was used for the storage of any material that we were using in our operations. This shaft referred to at the
111 time of our purchase of the Nine Hour claim was fifty-five or sixty feet deep, I believe. I don't think there was anything else put on that ground in 1892. In describing this cribbing I would say that when we commenced to sink it was uncertain whether the material we met with would be of sufficient good grade to mill, and we thought it possible that we might meet with some waste in the actual shaft-sinking itself, and for that purpose we put up the cribbing there, so that it would prevent this waste dumped out of the shaft from running down to and obstructing the road. The cribbing was about twenty feet long, probably. If the road had been on the line of the stakes, they probably would have been destroyed. In some cases they were thus destroyed. Some were left standing. The first I learned of anybody claiming this Compromise ground, aside from the plaintiff, was on the 12th of June, and the first I knew of any work being done by any one else was on the 5th of April, 1893, when Mr. Burrill, mine superintendent, informed me that he had found a man digging a trench on this ground.

Objected to as before.

Objection overruled and exception taken.

By Mr. DIXON: What we object to is the stating what Mr. Burrill told him.

Objection overruled and exception taken.

112 The cut was near the north end of the Compromise ground.

On the next day I wrote a letter to Mr. Mayger. The one I handed Mr. Mayger and the one about which he testified was a copy. It was dated Marysville, April 6th, 1893, 10.15, and reads as follows:

"To Mr. William Mayger.

DEAR SIR: I understand you had a man or men employed yesterday in trenching upon the strip of ground between corners No. 2 and No. 3 of the St. Louis Lode claim ceded to the Nine Hour Lode claim by the St. Louis Lode claim. I now beg to give you formal notice to withdraw such men, if still employed on this work, and to refrain from further trespass upon this ground."

I have no recollection of receiving any reply to it. I am resident managing director of the plaintiff company, and have had eleven years' experience in quartz mining and ten years' in railroad mining—tunnel mining. I know the apex shaft of the defendants' ground and the drifts from the shaft; became acquainted with them in 1893. There was a small shaft sunk at a point on the St. Louis claim about fifty or sixty feet west of corner No. 2. It was about eighteen or twenty feet deep, and a drift had been run on the vein encountered therein in a southerly direction about forty feet or thereabouts and stopped. The face of the drift had been stopped at the west Compromise line. The ore exposed in the forebreast of this drift was valuable for milling purposes. I was in court on the trial of
113 the case between these parties in May, 1893, and saw the maps introduced in evidence. This is one of plaintiff's exhibits in that case. (Here witness is handed a map.) It was exhibited on the trial about six weeks. The work in the apex shaft was done by the St. Louis Mining and Milling Company under the directions, I presume, of Mr. William Mayger. I cannot say when they started this drift which run up to the line again. For the purposes of showing that the St. Louis Mining and Milling Company had notice of our claim from the 17th day of April to May 26th, 1893, and after which it assumed to purchase it, we offer this map in evidence.

Which map was admitted, marked Exhibit 31 for plaintiff.

By the COURT: This is subject to the general objection.

By Mr. TOOLE: It is offered, I suppose, for the purpose of showing that defendants had notice in April, 1893, that plaintiff company claimed this thirty-foot strip, and this notice was before the defendant company purchased it. We claim that the notice that it imparted, and which put us on guard, we found, upon examination of the records and title, that they did not own this property. Mr. Hughes conceded that this map was before the defendant company had purchased the Compromise strip.

By the COURT: That this is a different proposition. So
114 far as its admission is concerned, I think it ought to be admitted, but I will let you take up the objection later and pass on it.

By Mr. CULLEN: We wish to introduce in evidence the record of a deed which I asked Mr. Mayger to produce. We also desire to offer judgment-roll in case of Ebenezer Sharpe *v.* James Huggins, filed February 18th, 1885.

Said judgment-roll was marked Exhibit 32 for plaintiff and introduced.

Said action brought in third judicial district court of Territory of Montana, Lewis and Clarke county, Ebenezer Sharpe, plaintiff, *versus* James Huggins, defendant. Complaint alleges in substance execution of note for $100.00, payable Jan. 1st, 1884, to order of Frank P. Sterling; interest from date at rate of one per cent. per month, with reasonable attorney's fees; reciting also that said note is secured by mortgage bearing even date, executed by James Huggins; that to secure the payment of said note said James Huggins on said date did make, execute, and deliver to said Sterling his certain mortgage to secure the payment of said note, said mortgage being made Exhibit A to complaint and attached thereto.

115 That plaintiff is the owner of note and mortgage by assignment, duly recorded in recorder's office, Lewis and Clarke county, Montana.

For a further cause of action plaintiff alleges that on March 26, 1883, at Helena, Montana, said Huggins made a mortgage to secure payment of $100.00, with lawful interest, to William Robinson, said mortgage being duly recorded and copy attached, marked Exhibit B and made a part of complaint.

That said sums still remain unpaid: that plaintiff is now the lawful owner of said mortgage by purchase and assignment thereof to him, duly recorded. Prayer: For judgment for amount due and interest, and attorney's fees, and for usual decree of foreclosure.

(Signed) JOHN W. EDDY,
Attorney for Plaintiff.

Duly verified.

EXHIBIT A (TO COMPLAINT).

Parties, James Huggins of Marysville, first party, and Frank P. Sterling, of Helena, second party; date, 19th of Jan., consideration $100.00; description: an undivided one-sixth (1/6) interest in and to the following-described quartz mining claim situated in Ottawa (unorganized) mining district, on what is known as "Cruse hill" in Lewis and Clarke county, Montana Territory, and known as the Nine Hour Lode mining claim, located by William Robinson

116 and James Huggins on the twenty-sixth day of July, A. D. 1880, and by them recorded in the office of the county clerk and recorder of the county of Lewis and Clarke aforesaid on the seventh day of August A. D. 1880, in Book E of Lodes on page 157 and 158 of the public records of said county, to which record reference is hereby made for a fuller description of said Nine Hour lode. * * *

Duly signed and acknowledged.

EXHIBIT B (TO COMPLAINT).

Mortgage, dated Mar. 29, 1883, between James Huggins, first party, and William Robinson, second party; consideration, one hundred dollars; description, one undivided one-sixth (1/6) in that certain lead, lode or mining claim commonly known and recorded as the Nine Hour lode or "9 Hour lode," situated, lying and being in Lewis and Clarke county, Montana, and about four thousand feet in a southerly direction from Cruse's mill (in Ottawa unorganized mining district) being bounded and described as follows: Commencing at the N. E. corner stake, running 300 feet S. E. to stake marked S. E. cor. 9 Hour lode, thence fifteen hundred feet S. W. to stake marked S. W. cor. 9 Hour lode; thence 300 feet N. W. to S. W. center line stake, thence 300 feet N. W. to N. W. cor. stake marked N. W. cor. 9 Hour lode, thence N. E. 50 feet to place of beginning.

For more particular description and identification of said lode
117 reference is had to record of said lode in Book E of Lodes, on page 457, of the records of Lewis and Clarke county, Montana, and made a part of this indenture. * * *

Duly executed and acknowledged.

Summons duly issued; duly served.

Defendant, James Huggins, duly appeared, by demurrer, on March 6th, 1885.

Decree duly entered March 13th, 1885, ordering property sold (*inter alia*), property described as follows:

"All that certain undivided one-sixth of the quartz lode mining claim commonly known and recorded as the Nine Hour Lode mining claim, and recorded in Book E of Lodes, on page 457, of the records of Lewis and Clarke county, Montana, and more particularly bounded as follows: Commencing at the northeast cor. center line stake and running 300 feet S. E. to stake marked S. E. cor. 9 Hour lode; thence 1,500 feet southwesterly to stake marked S. W. cor. 9 Hour lode; thence 300 feet northwest to S. W. center line stake; thence 200 feet northwest to N. W. cor. stake marked N. W. cor. 9 Hour lode, thence 1,500 feet northeasterly to stake marked N. E. cor. 9 Hour lode; thence southeasterly 50 feet to northwest center line stake marked 9 Hour lode and place of beginning, embracing 1,500 feet in length with surface ground 300 feet on the southeasterly side of said lode from center of vein at the surface and 300 feet at the northwesterly side, or so much as does not interfere with the Saint Louis Lode claim." * * *

118 Order of sale issued April 8th, 1885; property advertised for sale, sold to Ebenezer Sharpe, described as follows: "All that certain undivided one-sixth of the quartz lode mining claim commonly known and recorded as the Nine Hour Lode mining claim and recorded in Book E of Lodes, on page 457, of the records of Lewis and Clarke county, M. T. and more particularly bounded as follows: Commencing at the northeast corner line stake and running 300 feet S. E. to stake marked S. E. cor. 9 Hour lode

thence 1,500 feet southwesterly to stake marked S. W. cor. 9 Hour lode; thence 300 feet N. W. to S. W. center line stake; thence 300 feet northwest to N. W. cor. stake marked N. W. cor. 9 Hour lode; thence 1,500 feet northeasterly to stake marked N. E. cor. 9 Hour lode; thence southeasterly 50 feet to the northeast center line stake marked 9 Hour lode and place of beginning, embracing 1,500 feet in length with surface ground 300 on the southeasterly side of said lode from centre of vein at the surface and 300 feet on the northwesterly side, or so much as does not interfere with the St. Louis Lode claim." * * *

119 CLYDE J. TOOKER, a witness for plaintiff, called and sworn, testified as follows:

I am the deputy county recorder of this county. Witness produced Book 12 of Deeds and referred to page 177, a deed from Charles Mayger to St. Louis Mining and Milling Company, which reads as follows: The deed is dated the 9th day of July, 1887, and is the deed from Charles Mayger to the St. Louis Mining and Milling Company. A description of the property conveyed is as follows: "All that certain quartz mining property situate and being in Ottawa mining district, Lewis & Clarke county, Montana, and particularly described as follows, to wit, the St. Louis Lode mining claim, being the same claim located by the said party of the first part on September 28th, 1878, and recorded in Book E of Lodes, page 261, of the county records of Lewis & Clarke county, Montana, on October 12th, 1878, a more particular description whereof is contained in the record of said notice of location, to which reference is hereby made, save and excepting therefrom, however, all that portion thereof described in a certain agreement between the party of the first part herein and William Robinson, James Huggins, and Frank P. Sterling; which said agreement is duly recorded on page 325 of Book 4 of Miscellaneous of the records of the county of Lewis & Clarke."

Here an abstract of title was allowed to be introduced for what it was worth.

120 Plaintiff here closed its testimony.

And thereupon the said defendants filed their motion for a nonsuit herein; which said motion was in the words and figures as follows, to wit:

Title of Court.

Title of Cause.

Now come the defendants in the above-entitled cause and move the court for a nonsuit herein and dismissal of plaintiff's complaint for the following reasons, to wit:

1. Plaintiff has failed to prove a sufficient case for the court.

2. Because the plaintiff has failed to show that it is a successor in interest or owner of the thirty-foot strip of ground in controversy

3. Because the complaint in said cause does not state facts sufficient to constitute a cause of action or to authorize the relief demanded or any other relief.

4. Because under the allegations contained in said complaint and the evidence in support thereof the said contract or agreement sought to be enforced is contrary to public policy and in violation of the mineral land laws of the United States and of the State of Montana and the policy thereof, and is therefore void.

5. That the allegations of said complaint and the testi-
121 mony in support thereof shows that the said plaintiff in this action aided and assisted in the procurement of the patent to the said St. Louis Lode claim, including the ground in controversy, and is therefore estopped from denying the title and possession thereby acquired.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN, &
TOOLE & WALLACE, *Attorneys for Defendants.*

And said motion, after being argued and submitted, was by the court overruled; to which ruling of the court defendants then and there excepted.

Here defendants offered in evidence a certain map which was introduced upon the other trial to show what workings were done upon the thirty-foot strip in 1893.

By Mr. DIXON: If the court please, we desire now to make a motion to strike out all the evidence given upon the part of the plaintiff, to which we objected on its introduction—that is, all evidence relating to the discovery, location, boundaries, and stakes of the Nine Hour claim as originally located; all evidence relating to any possession or work by plaintiffs of the strip of ground in dispute prior to the date of the patent for the St. Louis Lode claim; also all evidence of declarations on the part of the plaintiff or any of its representatives in relation to what it claimed to own prior to the time the patent was issued; all evidence of declarations or maps for the purpose of showing the extent of the possession or for any other purpose, upon the ground that the patent is con-
122 clusive evidence of all these matters; also that the matters are immaterial and irrelevant and consist of declarations not part of the *res gesta* and inadmissible on that ground; the objections made to this evidence in support of this motion to strike being the same shown in the notes of the stenographer and for the reasons stated in the objections as the evidence was offered; and upon this matter we desire to ask a ruling of the court before proceeding further, because of course it is very material for us to know, in regard to our testimony, what is properly admitted in this case and what is not. This motion is to strike out separately and severally all parts of this evidence objected to as appears in the stenographer's notes and which was admitted by the court subject to future decision; also as to the matter of the deeds not conveying the property in dispute, which was objected to at the time.

By the COURT: As to those deeds, of course I don't know what the contents are and what the descriptions define, and I would like to have that explained to me, to see whether the language is broad enough to convey this ground. Just give a brief résumé of what the plaintiffs contend in reference to these deeds.

By Judge MCCONNELL: It seems to me these deeds are irrelevant upon another ground. This action here is for a specific performance, to compel the execution of a deed to this thirty-foot strip, under the provisions of that agreement or bond that has
123 been introduced in evidence. Now, they have got to stand or fall by their rights under that instrument, and exactly what right they claim to be owner of, whether by virtue of an assignment from Robinson of that agreement, or contract, or whatever it is, and that that is the basis of this lawsuit, and what these deeds have to do with it I cannot see. It seems to me they are irrelevant.

And the court, in ruling upon the motion of defendants to strike out the evidence aforesaid, struck out the declarations of the said Robinson and refused to strike out any other testimony; to which ruling of the court the defendants then and there duly excepted.

Here the map offered by the defendants in evidence was admitted and marked Exhibit A.

JAMES A. HUGGINS, called as a witness on behalf of the defendants, being sworn, testified as follows:

I was one of the original locators of the Nine Hour lode and one of the obligees in the bond of Mr. Mayger to Mr. Sterling, Mr. Robinson, and myself. We never done any work on this thirty-foot strip; we dumped some tailings on it in 1881; that was when we sunk our shaft. I applied to Mr. Charles Mayger for the privilege of dumping on this thirty-foot strip. He told me I could dump there.

124 By Mr. HUGHES: We object to that. Here is a statement that he applied to somebody for permission to do some work on this ground in conflict.

By Mr. TOOLE: You showed you dumped on it. We wish to show the circumstances under which it was done.

I know where what they call the magazine is. It is a hole that I dug myself in 1881, prospecting for the lead coming north, and it is dug on the Nine Hour, not on the thirty-foot strip; it was on the Nine Hour lode, outside of the thirty-foot strip. It was afterwards used for the powder-magazine house. The defendants used this thirty-foot strip for a repository for logs. They had logs on it then, 1891. They used the logs for the purpose of working. They had a road on it. The road was built by Mr. Mayger.

Cross-examination:

I was interested with Mr. De Camp in the lease of this property, and we sunk the shaft fifty feet deep here. It was in sinking this shaft we got permission from Mr. Mayger to dump there. I was up

there on the claim. I talked with Mr. De Camp and Mr. Robinson about the conversation with Mr. Mayger—that is, I don't know as we followed it up just that way. We spoke about it more, perhaps, at the time to see how he would feel over it. As long as he
125 did not say anything about it, we did not make any remarks about it. Mr. Mayger said we could dump there if we wanted to. We simply asked him the question, and he said he had no objection. I never conveyed away my interest in 1881 and made no deed to Mr. Robinson. I had not parted with my interest in the mine when I had this conversation with Mr. Mayger in 1881. I made several deeds, but don't remember the dates. The records of the deeds will show that; I haven't got them. I have stated all that occurred between Mr. Mayger and myself and all the circumstances connected with it, but I could not give the month when this occurred. It was while — was being done under the De Camp lease. I think it was in the fall. I recall these circumstances when we happened to be there and was talking about it the same year, but have not thought of it for a good while and cannot say when my attention was called to it lately. In referring to the powder magazine and the hole that I dug, I referred to a mine—the powder magazine testified to by plaintiff's witness. I saw it last about six weeks ago. I learned this winter that the plaintiff company was using it for a powder magazine. That is the first time I seen it and knew of it. That hole which I dug is onthe Nine Hour claim. The hole was outside of the line, but by cribbing in a portion of the building, perhaps, on both the disputed pieces of ground on the Nine Hour also, as near as I can guess. The hole may have been built bigger, so as to extend onto the thirty-foot strip. The hole was
126 made in 1880 or 1881. I sunk two more holes further on northeast, but neither of them were on the thirty-foot strip. It was on the Nine Hour ground, just above the St. Louis line. I think these hole are there now, so that they can be seen. They are pits dug in the ground, just little holes. I was working for myself at that time, independent of Mr. Robinson.

ALEXANDER MCINTOSH, being called as a witness for defendants, testified as follows:

I live in Marysville and know what is called the St. Louis and Nine Hour Lode mining claims. I was present at the time of the conversation mentioned by Mr. Henley, when Mr. Charles Mayger was making a survey of this thirty-foot strip. I heard that conversation. It was as follows: Well, Mr. Charles Mayger and I was measuring that ground and Mr. Henley came down and asked Mr. Mayger what he was doing. Mr. Mayger said he was measuring that ground. Mr. Henley asked him whose ground he was measuring. Mr. Mayger answered him, saying, "It is my ground." It was the thirty-foot strip we were measuring.

By the COURT: When was this, Mr. McIntosh?
By the WITNESS: Well, that was in the spring of 1892.

127 Cross-examination.

By Mr. HUGHES:

Myself and Mr. Henley were present; no one else. It was somewhere in the middle of the day. There were stakes and monuments there. Mr. Henley introduced the conversation. Now, this was fifty or a hundred and two hundred feet away from the Nine Hour shaft, and somewhere about the line of the St. Louis claim. We began the measurement about the southwest corner of the St. Louis claim, as I understand it. (Witness corrected himself by saying that it was the southeast corner.) I don't remember whether we stopped running off these lines at the time of this conversation or not; right in that vicinity we quit and left.

Q. Now, is it not true, Mr. McIntosh, that on the occasion to which you refer Mr. Henley inquired what Mr. Mayger was doing there and he refused to answer him?

A. No, sir; not that I know of. I don't know what Mr. Henley said when he started off; when he asked Mr. Mayger the question whose ground he was measuring, Mr. Mayger answered him that "it is my ground" that he was measuring.

Q. And you cannot say whether or not Mr. Henley told him that if he could not answer him civilly that that was the Montana Company's ground and that he must go away?

A. I didn't hear it. Mr. Henley was walking off. We terminated our work at about that point and went off. I am not certain where we went, whether to the apex shaft or not.

128 Redirect examination:

Q. You say that you commenced at the northwest corner of the St. Louis claim. Are you not mistaken about that? Was it not the southeast corner? Try and locate it in your mind now and see.

A. It is on the corner where this strip in controversy is situated. Now I remember rightly; it is the southeast corner. I was mistaken in that. It is the corner where the thirty-foot strip is, and that is what I wanted to get at. It is the southeast corner.

CHARLES MAYGER, a witness on behalf of the defendants, called, sworn, testified as follows:

I am one of the defendants in this action and one of the original owners of the St. Louis Lode claim. I was interested in it with my brother, William Mayger, each owning a half interest. I know about the conversation referred to by Mr. McIntosh and remember it. The conversation was this: I heard it rumored around Marysville that the Montana Company had hold of the surface of this apex ground, and I asked Mr. McIntosh to go on the hill with me and take the measurement, and we went up there, and we measured from corner No. 2 to corner No. 3, north, to the south line of the St. Louis until we came to this hole. It was a hole made through the surface to the bed-rock, and there were two or three drills lying

there, & they were inch-&-a-half steele. As I was holding
129 the line over the hole, Mr. Henley—I saw him at work in the Nine Hour shaft with his men—and I was holding a line over the hole, plumbing it down to take the measurement; Mr. Henley came down and approached me. He said, "Good morning." I told Mr. Henley I didn't want to talk to him. Well, he said that he had only asked me a civil question. I made no answer to that. He then said, "Do you own this ground?" or he then said, "What are you measuring?" I told him I was measuring this hole—locating this hole—and he said, "Do you own this ground?" I says, Yes. He turned and went back, and as he went back to the Nine Hour shaft he mumbled that that was to be proven. He said in an undertone that that was to be proven. That is the only conversation I had with him.

I know where the road referred to on this thirty-foot strip is. It was built by the St. Louis Company in the year 1888. They started the apex shaft in 1892. I worked on it and worked on it in 1893. They started on it in the fall of 1892 and have been working on it continuously ever since, and all the timber used there we would haul along on this road—the same road the Montana Company was speaking about in their evidence—and dump our timbers off on this ground for use at the apex shaft—I mean dumped it on this thirty-foot strip, partly on it and partly below. This road referred to was built by the St. Louis Company. The road came off the summit of the mountain and came down towards the Nine Hour shaft and turned on the east side of the shaft and went along the
130 inside. The St. Louis side lines passed down over the Nine Hour, through the Maskelyn and Marble Heart mines, and the Montana Company improved and built about one hundred and fifty feet of that ground connecting it with their ore bin. I know something about this large, extensive magazine. Before it was made into a magazine it was a prospect hole that had been sunk there by Mr. Huggins. The hole was enlarged by the plaintiff company, and the hill is a little steep there, and the hill was graded, and on the lower side of it the powder-house was built, right in the hole. It was done in the winter of 1891. The hole originally sunk by Mr. Huggins was not on the thirty-foot strip. About half the powder-house extends over the thirty-foot strip. I know of some cribbing that was put up close to the Nine Hour shaft. At the time that the Montana Company started to work on the Nine Hour shaft there was some old buildings on it, consisting of a shaft-house and a blacksmith shop, and they were all pulled down and the hoist was erected and this cribbing. There was cribbing made on the east side of the Nine Hour shaft, as near as I can judge, about on the line of the east side line of the St. Louis. There was a door made on the east side of the shaft-house, and the waste was dumped out of that door in this place where the cribbing was; that was before the ore bin was built.

Cross-examination.

By Mr. HUGHES:

The road I speak of as running over the Maskelyne and
131 Marble Heart and Nine Hour, I don't think all these claims belonged to the Montana Company; I don't think it owned the Maskelyne at that time. The St. Louis did not own any of them or claim any of them. The work that was done upon the road by the company—Montana Company—was in direct connection with the ore bin, where they were taking up the ore. There was always a road at this same place; always has been a road there; but they improved it and made good road of it. They were doing considerable hauling and taking considerable ore out of their shaft. They hauled off the old dump that was there before they began work and milled it, but I asked no questions about dump. This talk with Mr. Henley was about the middle of June, 1892. We were measuring on the east side line of the St. Louis. Henley asked me what I was doing and I declined to answer, and told him I didn't want anything to do with him, but I didn't again say it; I said it only once. He did not say to me when he started away that he had asked a civil question and wanted a civil answer, and did not say that this was the Montana Company's ground, and that I should get off of it. He asked me what I was measuring, and I said "I was measuring this hole." He asked me "did I own this ground" and I said, "Yes." I was standing within the side lines of the St. Louis. We were measuring a hole in the Nine Hour claim, outside of the thirty-foot strip, and he asked me if I owned that ground. I inferred the ground I was standing on, not the hole, and
132 when I said I owned it, he said that that was to be proven. We then went away, Mr. McIntosh going with me, and I don't recall where we went to. I am foreman for the defendant company, and had charge of their works, so far as it was done, and I am a stockholder in the company. When I sold to the company I took stock for it. I got my stock by deeding the St. Louis claim to the company. My brother, William Mayger, is also a stockholder in the company, and he received his stock in the same way.

J. S. KEERL, being sworn on behalf of defendants, testified:

My occupation is civil engineer; have been engaged in that business about eighteen or nineteen years. I know what is known as the St. Louis Lode claim. I did work for Charles Mayger and William Mayger there in the latter part of November, 1889. I made a survey of the St. Louis Lode claim, and included in it the thirty-foot strip in controversy. It was some time in December—the early part of it. I surveyed the eastern line of the St. Louis claim. The eastern line of the St. Louis Lode claim, as surveyed, took in the thirty-foot strip. I found stakes on the eastern line of the St. Louis claim, between corners one and two, at that time. They were made out of two-inch lumber or inch and a half pieces. I am familiar with this thirty-feet strip and have made surveys of it. There

stakes were along the east line of the thirty-foot strip. It
133 was the east line, between corners one and two. When I made my survey I found these stakes along the east line, between corners two and three. I found no stakes upon the thirty-foot strip, upon the west line of it. I am acquainted with the west side line of the thirty-foot strip and the east side line of the St. Louis, between corners one and two. I found no stakes between that point of intersection and corner No. 2. The distance from that point of intersection to corner No. 1 is sixty and one-half feet. The stakes I found were about fifty feet apart. I found one fifty feet from corner No. two. This would throw it between corner No. 2 and the point of intersection. These stakes were indicated or marked by other stakes driven alongside, probably three feet high, and they were marked with a lineman's notes. The first stake running from No. 2 north was plus fifty. The first stake was marked "one," the next to "one" plus fifty, and so on. I saw none of those indicators in the west line of the thirty-foot strip, in the west boundary line of the thirty-foot strip.

Cross-examination:

I have the notes of my survey.

Witness produces them.

I suppose that this survey was made for the St. Louis Mining and Milling Company. Mr. Mayger ordered the work. I may have testified that that was the fact at the former trials. I
134 think it is true that it was done for the St. Louis Mining Company, and I so understand it. I noted it as being done for the St. Louis Mining and Milling Company. It was for the purpose of some litigation between the St. Louis Mining and Milling Company and the Montana Company, Limited. When I testified in the case heretofore I think I was inquired of as to why I had not made the lines showing the Compromise ground. The lines were not put upon the map when I originally drew it, and upon my examination I was asked why they were not, and said I knew of no reason, and that I would put them there, and proceeded to do so. In the survey which I made and referred to I run the line along the St. Louis patented boundaries. I took it as the guide. I did not have the location certificate or any other data than the patent. There were workings on the thirty-foot strip at that time partly, and I found them by the survey and made notes showing what they were at the time. I started from corner No. 1 and ran to corner No. 2. I ran from corner No. 2 and measured to No. 1. On the line between corners one and two I found the line of stakes fifty feet apart. This would be partly on the line between the Nine Hour and St. Louis as far as it went. The thirty-foot strip is thirty feet wide, and, being oblique, makes it sixty and one-half feet to the intersection of the west line of the Compromise ground from corner No. 2 of St. Louis survey. I continued to make the survey along the patented lines of the St. Louis and did not look for any
135 stakes on the other side of the Compromise ground. I found

no stakes along the west line of the thirty-foot strip. I found no stakes there at all. I did not examine along that line.

Q. That was the line you were referring to when you stated you found no stakes along that line?

A. Yes, sir. Well, no; I beg your pardon. I understood Mr. Toole's question to ask whether I found any stakes along the eastern line of the St. Louis between corners two and three; that would be the east side of the Compromise.

I say I found none on that line. I found no stakes along the two lines which constituted the side lines of the Compromise strip upon either the east side or the west side. My survey was made along the east side and not the west side. I sketched the Nine Hour shaft-house at that time—on the notes I did.

Here defendants offered in evidence cross-interrogatory ten and the answer thereto of the deposition of Mr. Robinson, in reference to the testimony of Mr. Henley, in which he stated that Mr. Robinson pointed out to him the stakes on the Compromise ground.

Interrogatory aforesaid:

"Did you not, on or about September, 1889, take J. H. Henley, mine superintendent of the Montana Company, over the surface of the company's property, including the Nine Hour claim and
136 into the Compromise strip, and point out to him for his guidance in the working and taking care of said property of said company the Compromise ground as a part of the Montana Company's property, and say to him that the company owned it, and that the compromise between the owners of the St. Louis claim and the Nine Hour claim ceded this to the Nine Hour claim; and did you not point out to him a line of boundary stakes set by your direction, lying along the west side of this Compromise ground, as the west boundary of the Nine Hour claim?

Answer. My reply is that at some date, which I cannot now fix, I had put Mr. James Henley in possession of all the data relative to the company's property, in order that he might assume superintendence thereof. As to the Compromise property, while it is possible I did point out this ground especially to him, I do not have any remembrance on that point. It is not, however, a fact that I showed him any stakes standing upon the west boundary of this strip, for the very reason I never set any or caused any to be placed there, to the best of my remembrance and belief. Stakes bounding the Montana Company's property, which was represented by the west side line of the Nine Hour claim, were only set as far south as corner No. 2."

137 JOHN R. PARKS, called on behalf of the defendants, and sworn, testified as follows:

I am a mining engineer by profession and have been such for fifteen years. I am acquainted with what is known as the St. Louis claim and the Nine Hour claim and have known them ever since 1888. I was employed to make an examination of them, as consulting engineer for the St. Louis Company. I made frequent ex-

aminations of the southeastern portion of the St. Louis claim in order to trace up the Drum Lummon lode, what is known as the Drum Lummon lode, and it carried me over that property at different times from my first connection with the company to the present. I made a great many trips up and down the whole length of that property, looking for indications of the outcroppings of the vein. It lead me directly to this thirty-foot strip and I made examinations of the surface of it for the reason that I had examined the north end of the property and the Montana Company surface workings, and, tracing that south, my first conclusion was—I traced it south and at the Nine Hour shaft, which is very close to the southeast portion of the St. Louis Company—which indications lead me to make examinations. I heard the testimony with reference to some stakes that were put upon this thirty-foot strip of ground. I don't remember any stakes there, except the corners No. two and three, which bound the eastern boundary, the southern portion of the St. Louis. I saw no stakes there in an early day, and saw
138 none afterwards, except those that were put there by Mr. Neustedter. Mr. Neustedter was Mr. Keerl's assistant. I cannot say that I was present at the very day the survey was made, but was around the property. This, however, was after the injunction was obtained—I believe in 1893. As to the work done upon this thirty-foot strip, there was no surface working on the thirty-foot strip whatever, as far as mining or hunting for a mine is concerned. There was a road which came over there from a northeasterly direction down the hill and ran over this thirty-foot strip and lead to the north end of the same. Another road ran down the gulch and cut across the southeast corner of the strip. The first work that was done there with a view to mining after I became acquainted with *in* in 1888 I caused to be done in hunting for the foot wall of the lode. I traced it with a series of cuts from the St. Louis property across the thirty-foot strip near the southern end, avoiding the road. That made two cuts on the thirty-foot strip, with the road between them. This was about ten days or two weeks before they started their cut on the north end. I believe the date of that was given as the 5th of April, 1893. I know when the apex shaft was started. There was a little prospect hole down there in 1891. There was a little prospect work done there in 1891 and the shaft was started in 1892. The thirty-foot strip was used by the St. Louis Company. I remember of seeing timbers which were brought
139 along this road and dumped on the thirty-foot strip for the St. Louis Company. The apex shaft from the line of the thirty-foot strip is fifteen or tweaty feet. I can tell by inspecting the map.

Upon inspecting the map witness states:

It must be about twenty-five feet. And there was a building around the shaft, and the building was a little closer to the line than the shaft itself. The map is accurate and is on a scale of twenty feet to the inch. The building that surrounds the shaft is twelve by fourteen or twelve by twenty; I have forgotten the exact dimensions. I was looking after this matter for the defendants in

this case. I never heard of the plaintiff claiming this thirty-foot strip. I believe he showed me the letter he received from Mr. Bayliss when they warned us to stop work on the north end of the thirty-foot strip. I never heard of them making any objections. They made no objections to me whatever when I was up there with the men working on the south end of the strip, which was previous—that is, in the neighborhood of ten days or two weeks before we made the cut on the north end. The objections were made after we had made this cut on the north end. While we were prospecting on this thirty-foot property for the purpose of ascertaining where the apex of the vein was plaintiff apparently was making and prospecting theirs, but not on the thirty-foot strip. They kept carefully on the east side of the east side line of the thirty-foot strip and of this second cut, which I made and of which
140 Mr. Bayliss notified Mr. Mayger to desist in. I made the cut and for the purpose of seeing what they were trying to do as much as anything else, and I ran up the hill to expose the surface up to their cut, which was on the east side line. Their workings were all outside of the thirty-foot strip and outside of the east side line of the St. Louis claim as patented. When they opened the little cut east of the east side line, plaintiff started to do some very deep drilling. They started with churn drills some twenty or twenty-two feet long, full bars of hexagonal steel, and started four holes and were drilling them. It was a guess with me what it was for. Considering the dip of this vein and the direction of the drilling, they would have penetrated the vein if it outcropped at the side line at that point and on the St. Louis ground. These holes were outside of the thirty-foot strip and going down to such a depth that they would have penetrated the vein outcropping on our strip if it was near the east side of it. I can't tell the exact distance of these drillholes from the east line of the thirty-foot strip. I suppose the nearest one must have been three or four feet, the other ones four or five feet or over. I could tell by looking on the map.

Upon examining the map witness stated that they cannot be over three feet from the east side line. One of the holes I distinctly remember was down in that corner. It must have been within
141 four or five feet of the east side line of the St. Louis patent. I can represent these holes as I remember them, taking the map and representing them. The distance would be less than five feet—less than a quarter of an inch. This vein near the surface dips at a less angle than it does below; varies from fifty degrees to and if the vein was within five feet of our line they would have struck it within seven or eight feet. If the vein apexed within five feet of the side line of the St. Louis they would have entered the vein with their drill-holes. That is just a guess from these vertical drill-holes within seven or eight or nine feet. I don't know the depth of those drill-holes. I saw the men pull out the rods and they were very deep drill-holes—what are called churn drill-holes. It is a method used where you want to sink a deep hole without putting up any machinery.

Cross-examination:

The Montana people carefully avoided going over the line of the thirty-foot strip. I have no statement from anybody in authority in that company, but I saw from the work they were not even throwing waste over the line. They were throwing it sideways. I drew that conclusion from this fact: In mining—in starting a hole in that hill that way they would throw the dirt down the hill and he would not throw his dirt sideways and keep it from going down the hill, and had it gone down the hill it would have gone on the thirty-foot strip. There is a road there, and the road is pretty
142 close to it. I don't know that the reason was to avoid obstructing it—the road. There was sufficient room for some of it between the road and this point. It is not very steep; not over thirty degrees. If any large quantity had been thrown there it would, of course, have gone into the road.

Q. If they had thrown any, it would have rolled down there?

A. No. I don't know absolutely what object there would be in sinking there; I was not absolutely informed. The drill-holes would be eight or nine feet—perhaps inside of seven feet—on account of the slope of the hill before it reached the vein if it apexed where I stated it would. The careful avoidance of the ground by plaintiff is not drawn from what I have sworn to, but it is drawn from what I have observed. The timbers which were put on the thirty-foot strip by defendants for use were hauled along the road and put in the vicinity of the shaft; as I remember, it was scattered on both sides to the north and south of the shaft and up the hill from the shaft. I had nothing to do with putting it there. Part of it was taken away immediately and used in putting up a shaft-house; the balance lay there until they intended to use it. I don't know of Mr. Burrill ordering it away, nor of its being taken away. I don't think it was removed. I don't know that Burrill ever made such an order, nor do I know that it was ever removed, ex-
143 cept just as it was used. One of the cuts was made before the trial and before the order of the court. I remember the trial was put over a week for us to complete our maps and our survey. The work was going on during the trial, this very work about which I have testified to, and as a part of the St. Louis development work, and some of it was started before the trial; not for the purposes of the trial, they were not. That work was not specially for the purposes of the trial, because we concluded not to take in the south end of the property, if you will remember. I mean in the trial. That was excluded—this work was excluded. I think it took about six weeks to try the case; took about five days to take my testimony and it took about five or six weeks to take the balance of it—something like that; perhaps half of it was taken up in the testimony. This work I referred to was done by the St. Louis Mining Company; it was done under my directions. We were no. claiming ownership of this thirty-foot strip for the St. Louis at that time. I don't think I was asked anything about it on that point on the last trial. I think I was frequently asked to

show where the line was, but I don't think I was questioned as to whether it was included or not included. I remember pointing out what was called the Compromise line. I knew the bin, and shaft-house, and cribbing, and part of it was on the Compromise ground. I think the distance the shaft-house extended on the Compromise ground has been exaggerated in this case to what
144 it really is. The map that was on Mr. Keerl's tracings here today is correct as to the old shaft-house; the old blacksmith shop of the old Nine Hour shaft-house came over on the St. Louis ground, or on the Compromise strip, as it has been termed, about eight or nine feet, and there was a new one put up later. I think the ore bin sticks over there less than the first shaft-house did; it has been testified ten or twelve feet, but I think it is not so much. there were no stakes on the east and west lines of the Compromise strip.

Q. You have stated all that you know about stakes and of the search made for them?

A. No, sir. These stakes had they been there I should have noted them. I was present during the survey. Simply went there to see that the work was done properly. Mr. Keerl was the surveyor and I was instructing him the points to include in the survey. I never had charge of the litigation and did not say that I had. The Neustedter stakes referred to were put there after the litigation commenced and the injunction, I believe. It was in 1896. I cannot recall the dates exactly as to the month. The iron peg was put on the east side line sixty and one-half feet north of corner No. 2. I don't know that Mr. Cummings or who put it there. My attention was called to it by Mr. Neustedter. I don't know who put the stakes I saw there. I assumed Mr. Neustedter put them there. He called my attention to it and told me that this was the point.

145 Redirect examination:

The witness here pointed out where the apex shaft was upon the map and the little hole where the churn drills were sunk, which is outside of the thirty-foot strip.

Witness also pointed out where the road was and where the dirt was thrown over that part from the cut.

From this cut, I believe part was thrown on the side and some of it was put on the road and levelled off. The distance from where this four or five foot shaft is in which these drill-holes were made down to the road where it is said the dirt could roll on it is between thirty and thirty-five feet.

By Mr. HUGHES: Is it not true that this is not the place where any dirt was thrown at all; simply churn drills put down?

No, sir; they dug a pit. They dug a hole first, and then they went down in this pit. After they cleaned up the bottom of the pit they dug a little shaft and evened up the bed-rock, and then from the bottom of this pit they started those drill-holes.

Q. Is it not true there was no dirt thrown either right or left?

A. No, sir. There is a hole. I would like to know where the

dirt went to. There is the hole dug in the earth all through
146 the drift and the bed-rock evened up and the drill-holes started in here. There were several tons of dirt or more. We were talking of this particular hole in speaking of throwing the dirt to the right and to the left and about it coming into the road.

WILLIAM MAYGER, called on behalf of defendants, being duly sworn, testified:

I have been acquainted with the ground in controversy a number of years. My first acquaintance with the St. Louis claim was in the winter or fall of 1878, after it was located, and it was located when I was in Butte. I have known the Nine Hour ground long before it was located and since it has been located. My brother, Charles Mayger, was the locator of the St. Louis claim. I was interested in it and owned a half of it. I am acquainted with Professor Parks, and employed him in the matter of these surveys. We have been in the possession of that property. I stated that first, and then I was corrected. We had possession. Those are the only words I know how to say in regard to it. From the time that we obtained our patent I have been in possession of the property by working on it, prospecting on it, hunting for the lead over it at various times in various years, and I don't believe there is any time for more than a few months from the time we have had that property that I have not been on the property when I was at home. I have been away from Marysville several times since then,
147 but I mean when I was in the camp. When the survey was made for the St. Louis claim corner stakes were up. I helped make the survey. The corners were put up by surveyor's monument rocks placed in the ground and piles of rocks around them. I marked these rocks myself under direction of a surveyor. I think it was in 1881 when the survey was made. Corners one, two, and three were put up. We divided the east side line from the adjoining claim. Corner No. 2 is in the jog on the east side line of the St. Louis. Corner No. 3 is four hundred and three feet in a southwesterly direction from corner No. 2, and it bounds what is called the southeast corner of the St. Louis location. The St. Louis Company has been in possession of that part of the St. Louis Lode claim that they purchased from the time they purchased it from Charles Mayger. I didn't say that they were in possession of that which it had not purchased. The St. Louis Company had been in the possession of the St. Louis claim as far as they purchased from the time they did purchase it. Previous to the purchase by the St. Louis Company myself and Charles F. Mayger were in possession of it from the time it was patented. We made the survey of the lines of the St. Louis claim, including the eastern boundary of the thirty-foot strip. I think we ran around these lines in the fall of 1887. I had John W. Wade survey it—that east side line—from corner No. 3 to corner No. 1. In 1889 I had Mr. Keerl make a complete survey of the St. Louis location,

all around it, on the east side line from corner No. 1
148 to corner No. 3. The condition of this thirty-foot strip upon its surface at the time we made the application for patent of the St. Louis mining claim below the Nine Hour dump, or dirt that we called waste, or dirt taken out of the Nine Hour shaft, was dumped on this portion of the claim at that point, and that was all that was dumped. Our survey line passed right over the top of what had been used as the blacksmith shop in the old Nine Hour workings before the survey was made. This old shop was not in use at that time; it had been abandoned. It was simply some small logs laid up in the form of a log house with poles on top and dirt thrown over it for a roof, and the line of the claim passed right through it. In the spring of 1892 I went East; I was gone until about August. When I came back here I found that the Montana Company had erected in my absence an ore bin attached to the Nine Hour shaft building, and there was something said about the magazine that the Montana Company has introduced in testimony. That was simply a small hole in the ground, with a door put up in front and a dirt roof put up on that to keep one or two boxes of powder in there for the convenience of the men. I think it was done during my absence in the East. That was the condition of the claim. That hole had been dug there some time before—shortly after the survey was made in 1881 of the St. Louis lines; it was on side of the thirty-foot strip. I have examined that hole many
149 times in trying to trace the direction of the vein, and what is called the powder magazine was constructed from this hole. That hole originally was a hole probably about four and one-half feet to five feet deep. When turned into a powder magazine it was extended down the hill until the surface ground became level with its floor. That gave it the height necessary to put in a door and cover it over and make a powder-house of it. It never was extended on the thirty-foot strip until the spring of 1892. That was the first time I noticed its being there, was when I came back from the East. The ore bin which was constructed extended over on to the thirty-foot strip probably three or four feet. I never measured it particularly; the line goes over. I never discovered that it extended over to the thirty-foot strip until some time during our trial in 1893. As to the exact line at the point, we had not had it staked out so as to tell exactly where the line was at that point until after our suit in 1893. In tracing the vein I had the surveyors go up there and locate that ground and set stakes in various places in close enough distance, so that I could see with my eye where the line exactly was. He staked the west side of that thirty-foot strip and also the east side of that thirty-foot strip. We have marks now on the ore bin of the Montana Company where the line crosses that bin, so that I can tell exactly where the line is. A man cannot stand at one corner and see the other corner. The ground breaks away on the southeast corner there, so that when you stand there you are
150 not in sight of No. 2 corner. I had Mr. Neustedter put three stakes in between, so that I could tell, and in that survey it extended over a few feet. That was in 1893. During all this time

the Montana Company, Limited, or no one of its predecessors in interest, claimed or asserted any claim to this thirty-foot strip of ground to me; on the contrary, Mr. Robinson told me that he did not assert any claim.

The latter part of this answer, being objected —, was stricken out.

The first time that I ever discovered that the Montana Company ever asserted any title to this thirty-foot strip was when they commenced to sink a shaft on the west boundary line of the thirty-foot strip and take out ore to mill it, and hauling it away, was the first notice that I had that they asserted any claim whatever. That was in the year 1893, in June, I think. I had examined the deeds of conveyance that were made by the Montana Company, Limited, and I have examined all their deeds.

Q. From these deeds what did you ascertain?

Objected to.

The deeds are here in evidence. He cannot swear as to what is in the deeds.

Objection sustained by the court; to which ruling of the court defendants then and there duly excepted.

151 The first time I have had any knowledge or information of any assignment of this bond to them, by which this thirty-foot strip is claimed to have been transferred to it, was when they sunk the shaft, in the injunction proceedings. In going through the records in the county clerk's office in 1893 I came across an assignment of William Robinson to R. T. Bayliss. I have no knowledge that this has been assigned over to the Montana Company, Limited. During the spring of 1888 or the early part of the winter of 1888 we built our shaft-house and commenced work there with machinery, and I built a road from our shaft-house, following along the line of the Marble Heart, into the Maskelyne location, into the Nine Hour location, or into the St. Louis location, after passing through that point of the Nine Hour which cuts through the north end and then passes into the St. Louis and passes on through the thirty-foot strip up to within probably fifty feet of the Nine Hour shaft, where the road passes out of the side line of the St. Louis location and goes on over the top of the range and there connects with a road that was on the top of the hill. We used that road for hauling wood down to our shaft-house. Along the thirty-foot strip there was considerable of a grade; probably we graded down three feet on the upper side to make the road. On the turn—it is a little steep there—it came right around this hole that was afterwards used for the powder-house. I remember the hole being there at that time—even then. Then we used that road for hauling timbers and one thing and another to our own works—logging and such timbers as that. While I was 152 away I think the Montana Company made some additions to that road—that is, they extended it probably one hundred or one hundred and fifty feet and made a turn out from our road close

to the Nine Hour shaft, so that they could go up and turn out and come around by the Nine Hour shaft and draw the ore and come back on our road. They took our road as far as we had made it and then extended it down to the Drum Lummon ground, where they dropped the ore to the ground—took it out from the levels below. There was a prior road to all these roads, made when the first work on the Nine Hour was done, when Mr. De Camp hauled the ore down to what they called the little one-stamp mill. That road came up to the face of the Nine Hour shaft, on the dump where the ore was and went on down. It was then also connected with our road, so as we used to sometimes haul timbers to that apex shaft after we opened through that way. It was the only way we could get anything up to that height on the hill. We had other roads below this, but they didn't extend that high. We used to sometimes haul that way. Whenever it was necessary to haul in such timbers or lagging or anything of that kind the lagging was put on this ground or where it was most convenient. That dates from the fall of 1892—that is, that these timbers were deposited there. I done considerable prospecting on this ground in 1891. I was prospecting for the purpose of ascertaining the apex or course of this vein. Upon this thirty-foot strip in the fall of 1891 I under-
153 took to trace up some very rich float that I had found in the location, and traced it up to the most favorable-looking point where we thought of sinking a shaft. There we started our apex shaft. In doing this I traced it all the way up close to the Nine Hour shaft on the thirty-foot strip. I ran a little tunnel in there. We had a water ditch running through and a pipe line, and I found the indications along the water ditch, and I ran in a tunnel to satisfy my mind as to where the vein was running. I also dug some small holes on the thirty-foot strip and in the wagon road where we made this grade. This was in the fall of 1891. In 1892 I went East in the spring and came back in the latter part of the summer. After I came back we commenced developing in the apex shaft-work and working on the vein there. Since then I have been working and developing it ever since. There never was any work done on this thirty-foot strip, except what was either done by me or by my brother, by any one from 1881 up to 1892, aside from the dump mentioned—I mean outside of the old dump put there by Mr Huggins. The work that was done there in 1892 consists of this powder-house and this bin which was extended over a short distance on the thirty-foot strip. In 1893 we done considerable work there in developing this vein, trying to trace it through from the north end line of our location to the south end line by a succession of holes sunk in that year. I attended to and took charge of the execution
154 of a bond for a deed from Charle- Mayger to William Robinson, Frank P. Sterling, and James Huggins. Myself and Frank P. Sterling made the compromise.

Q. Under your arrangement, to whom was this deed to be executed?

Objected to.

Here defendants proposed to prove by the witness that he superintended and attended, in fact, to the negotiations and arrangements for the bond in suit, and that by the mutual understanding between the parties the deed was to be executed to the beneficiaries therein or obligees in said bond, and that by mistake it had been left out—that is to say, the names of Huggins and Sterling were left out by mistake—and propounded said question for eliciting said testimony, which was objected to as incompetent for the reason that the said bond spoke for itself.

Which objection was sustained by the court; to which ruling of the court defendants then and there duly excepted.

Cross-examination.

By Mr. HUGHES:

I am a half owner of the claim, but my title was not of record. I took a power of attorney from my brother, and under that made the deed to the St. Louis Company which has been offered in evidence.

I have been an officer of the company ever since its organi-
155 zation and made the conveyance to it under this power of attorney from my brother. That was the conveyance which excluded the ground in controversy, the thirty-foot strip. There was only one, and that is the one I referred to in 1887. I first learned that the Montana Company claimed this strip, this thirty-foot strip, when they commenced sinking a shaft on the property. It was some time in the summer of 1893. I was under the impression that it was about that time, about the fore part of June. It was when the injunction proceedings were brought against the Montana Company to restrain them from sinking that shaft; it was during the litigation. The injunction was first obtained in Judge Hunt's court, and afterwards the case was transferred to the United States court. I think that the deed that the St. Louis Company obtained was on the 10th of June. It was after that deed that the St. Louis Company claimed it. I cannot tell whether the shaft was commenced before or after the deed for the thirty foot strip. It was close about that time. From that time on it has been in litigation. I had not learned before the litigation that the Montana Company claimed it. I desire to correct this; I think it was during the time of the trial that I found this assignment of William Robinson's bond. I don't think that I was advised that the Montana Company claimed it. I thought they had looked at it, like an orphan, and had taken it in. It was not claimed by the

St. Louis Company before that time. I say the St.
156 Louis Company had not claimed it in their pleadings at all. When that evidence was taken in court here during that hearing the Montana immediately adopted the possession and ownership of that. That is the first I knew of it. I remember Mr. Bayliss speaking to me about the transcontinental tunnel, but do not recall of him forbidding me running it into the thirty-foot strip. I did not state to him that I had no intention to

do so. I recall his coming to me in the other court-room over there, but that tunnel at this time had penetrated the thirty-foot strip and was passing under the Nine Hour ground. He showed it to me on the map where we were at the end of our tunnel. We were almost vertically under the one hundred and ninety foot level of the Nine Hour shaft, which were their workings. It was the first time I knew that we were so far. He never forbid me going into the thirty-foot strip. I remember the conversation. I remember of him asking Mr. Keerl to put the thirty-foot strip upon the map during the trial, in the very beginning of your case, and that it was done. It was not stated then that the Montana Company claimed the ground. It was simply stated that it did not at that time belong to the St. Louis Company, the complaint of the St. Louis Mining and Milling Company excluding it. We knew that it was property enough to designate what the complaint covered on the map and it was put on there with that view. That is to show that the St. Louis Company did not claim it at that time, and up to that time it did not claim it, nor did the Montana Company, to my
157 knowledge.

Q. You were here during all the trial?

A. Yes, sir; but it was afterwards, when they discovered the St. Louis didn't own it, as I said before, they undertook to father themselves—to take in the orphan and put it on their maps when they were introduced. This was done before the trial was over. I had forgotten the letter received from Mr. Bayliss on the 6th of April. I was informed in it that he claimed—made a claim to the thirty-foot strip. I sent word back that Mr. Bayliss did not own the thirty-foot strip. I simply got this letter—just what it says in it. This was some time before the shaft was started, from working which they were enjoined in June; so, really, I knew of the claim in April. Now, I would like to correct this. As I stated before during the trial, I discovered this assignment of William Robinson's in the bond, or his assignment of an interest in the bond, and besides that I held the other two interests myself—that is, the assignment of the Huggins interest and the assignment of the Sterling interest.

This answer was stricken out; to which ruling of the court in striking the same out defendants then and there duly excepted.

I stated in answer to a question of Mr. Toole that the St. Louis Company took possession of what was deeded to it from the
158 time it was deeded to it. This was in June, 1893; that is my recollection, but I am not positive on that subject. I have not seen the deed since it was first given. My impression is that it was on the 10th of June. I don't claim that the St. Louis had possession of that strip prior to that time, as a company. Mr. Charles Mayger was in charge of the property during my absence. He had no official charge, any more than I left him in charge of the property. Let me explain. I held the position of superintendent of the company, and there has never been by the company any officer appointed to take charge when I was away. Whatever

charge there he had was through me and not through the company. I left him in charge of the company's affairs until I returned. Surveyors were there and Mr. Neustedter made the survey and there may have been stakes set there prior to 1893. So far as I know they did not. A mark of the east line is made on the ore bin—that is, a surveyor's mark is made on it, on the south side of it. That was not done in 1893. It was more recently done by Mr. Neustedter in 1894; probably 1894. I think it was done in 1894 and not in 1895. Some work was done on the surface of the thirty-foot strip by the St. Louis Company in 1893. We have done work there since then. There were mutual injunctions and then permissions to do work. The work that I have spoken of first was done before the injunctions or arrangements to work the ground, with a view to tracing the vein prior to the suit, but in 1893. The
159 apex shaft was not on the thirty-foot strip, but a level from it penetrated this ground. I think before the trial of 1893.

The cross-cut running towards the east side line that was in evidence, I think, was the thirty-foot strip. I don't remember. The one running south was stopped at the line. It proved to be on the line. It was stopped simply because we did not want to run any farther. We did not know where the line was. We had it afterwards surveyed and completed on the map, but did not know at the time we were running it. I think the other one did reach the line; I am not sure. When that work was done they cut no figure in regard to the work because we did not know where they were. The surveys were made afterwards. There is only one shaft we call the apex shaft; that is the one referred to; it was begun in 1892. The prospecting shaft sunk in 1891 was south of the apex shaft. It was not a shaft; it was an open cut, and there was a tunnel in the end of the cut. It was known at the trial as cut 17 or 18; about that. Those were all these large maps that we had on the former trial. Cut 16 was a cut north of the apex shaft, and I think this was the next to it. This cut was not made with reference to any lawsuit. This cut was done by me in prospecting. It was done before the suit. This work was done by me in prospecting and some of the prospecting was in the thirty-foot strip. As far as I know, the Montana Company have never done anything to lead me
160 to believe that they had any claim in that thirty-foot strip except as I have stated before. The timbers deposited on the thirty-foot strip by defendant company were used at the little shaft and also at the mine on that end of the property. I don't remember how long those timbers stayed there. They were put there, I presume, in 1892. We were using timbers there and this was the only means we had of getting them. I never knew of Burrill ordering the timbers removed and never knew of them being removed on that account. It was never reported that way to me, nor was anything said about it to me. I don't know that Mr. De Camp was at work dumping on the ground when the survey was made. I was on the ground and I helped make the survey. I don't think that they were at work and dumping on this ground at that time, or

that they were using the blacksmith shop or that he was using the blacksmith shop. You asked me about the tunnel; the one you referred to is the one, I expect—is when I was prospecting I run a little coyote—that is, a little, small tunnel, just big enough for one to handle a pick in, in 1891. It commenced in the St. Louis rather, it is a succession of holes from way down on the St. Louis clear up to where I got the evidence of the vein. I don't know positively whether the end of the tunnel is past the thirty-foot strip or not; it is close on it. These cuts were between the apex shaft No. 2 and the apex shaft, somewhere along there.

161 Redirect examination:

At the time I constructed this road for the St. Louis Mining Company I was also a half owner in the thirty-foot strip, and this road was built while the title to the property was in that situation. The cribbing referred to was some cribbing about some seven or eight feet, I should judge, back from the face of the ore bin of the Nine Hour shaft on the north side. That cribbing held up some dirt that made an entrance to a side door as you went in on the left of the hoisting plant, and that cribbing was testified to in one of the injunction suits, and it was torn down a short time after that. The map representing some cribbing here, I don't understand it at all from the fact that it represents cribbing on the south side of the Nine Hour shaft where there never was any cribbing at all. On that side of the shaft there never was any occasion for it, because there was no dirt there at all or anything else, and there is a small line of sticks stakes down between the two roads. The wagons took the ore from the ore bin and the road they came in on to turn around to make the turn. There are some pins driven in there and a board and possibly a hole to keep the dirt—some boards there to keep the dirt from the upper part of the road from crowding down on the lower road. The old cribbing was put up between the line of the St. Louis and the Nine Hour, where it passes through the ore bin of the *of the* Montana Company.

162 Recross-examination:

I do swear that there is no cribbing on the side, as I have stated, and don't understand this cribbing represented here on this map. I have been over the ground a number of times, and remember of seeing no cribbing there. The cribbing was right along there where the line crosses the ore bin, and it kept the dirt up. We had a survey point on the top of that pile of dirt. It was level with the door; carried from our location through there, then carried the line from the top of the dirt pile down into the Nine Hour shaft at the time we made the survey in 1893.

Q. Do you swear it is not there?

A. As far as my knowledge goes, it is not there.

There is a small lot of cribbing between this road, or just boards laid up this way and about four or five inch lagging driven into the ground that holds that board up. That stops this dirt from crowding

ing down to this road. There are several roads, more than are represented on that map.

Redirect examination:

I remember the small place where this building was done, and heard the testimony of Mr. Parks. The hole, I should judge, was ten or twelve feet square. It was a drift on the hillside, squared down to that extent, and that dirt thrown up on the side so as to
163 clear the bed-rock. It was just alongside of corner No. 2. This maps represents cor. No. 2 there, and this cut that we ran up there run right abreast of the hole. I should judge the distance from that point to the road in the neighborhood of from twenty-five to thirty feet. The dirt at this cut that we were running was thrown up on both sides of that cut, and the dirt from that hole was thrown up the hill and kept up by some stakes and cribbing.

Recross-examination:

Here defendants offered in evidence a certified map from the U. S. surveyor general's office—a plat of the survey at the land office, showing what is designated as lot No. 63; which was objected to by plaintiff; objection overruled, and said map admitted in evidence and marked Exhibit B for defendants.

(Here insert Exhibit B for defendants.)

And defendants, by leave of court, introduced in evidence the deed from Frank P. Sterling to William Mayger.

Also the deed from James Huggins to William Mayger, superintendent of the company.

Which said deeds were marked respectively Exhibits C and D for defendants.

Quitclaim deed; dated, 13th day of March 1893, between Frank P. Sterling and his wife Florana L. Sterling, of Helena,
164 county of Lewis & Clarke, Montana, parties of the first part, and William Mayger, superintendent of the St. Louis Mining & Milling Company of Montana, of Marysville, in said county and State, party of the second part; consideration fifty dollars; whereby said parties of the first part "do by these presents remise, release and forever quitclaim unto the said party of the second part and to his heirs and assigns forever, all the right, title, interest or estate of the said parties of the first part, or either of them in a certain bond for deed given by Charles Mayger to William Robinson James Huggins and Frank P. Sterling and recorded in the records of the county recorder of Lewis & Clarke, State of Montana, March 8th, 1884, at three o'clock a. m. on page 325, Book 4, Miscellaneous Records; signed Charles F. Mayger, said record is hereby made a part of this agreement, and reference is hereby made thereto for a full description of the property and also other details of the same. The parties of the first part also remise, release and forever quitclaim unto the said party of the second part, all the estate, right, title, property, interest possession, claim and demand whatsoever, as well in law as in equity, that the said parties of the first part may have in or to

the said premises therein described and every part and parcel thereof."

(Signed) FRANK P. STERLING.
FLORANA L. STERLING.

Duly acknowledged. Duly filed and recorded.

165 Deed. Dated, 13th day of March, 1893, between James Huggins of Marysville, county of Lewis & Clarke and State of Montana, party of the first part and Wm. Mayger, superintendent of the St. Louis Mining and Milling Company of Montana, of Marysville, in said county and State, party of the second part; consideration, fifty dollars; whereby the party of the first part "does by the- presents remise, release and forever quitclaim unto the said party of the second part and to his heirs and assigns forever all the right, title, interest or estate of the said party of the first part in a certain bond for deed given by Charles Mayger to William Robinson, James Huggins, and Frank P. Sterling, and recorded in the records of the county recorder of Lewis & Clarke county, State of Montana, March 8th, 1884, at three o'clock a. m. on page 325, Book Four, Miscellaneous Records and signed Charles F. Mayger, said record is hereby made a part of this agreement and reference is hereby made thereto for a full description of the property and all other details of the same. The party of the first part also remises, release- and forever quitclaim- unto the said party of the second part all the estate, right, title, property, interest, possession, claim and demand whatsoever, as well in law as in equity, that the said party of the first part may have in or to the said premises therein described and every part and parcel thereof."

JAMES HUGGINS.

Duly acknowledged.

166 Here counsel agreed that the deed from Charles Mayger to the St. Louis Mining and Milling Company of Montana, set out and referred to in the plaintiff's complaint, was sufficiently averred to make it a part of the evidence in the case.

CHARLES MAYGER, recalled for defendants, testified as follows:

I am acquainted with Mr. Robinson, one of the obligees in this bond mentioned in the pleadings, and have known him ever since he located the Nine Hour claim. I had a conversation with him in reference to this bond and the execution of the deed mentioned in it at Marysville in the fall of 1887. Mr. Robinson met me in Marysville in the fall of 1887 and asked me to make him a deed under the bond that I had given him, but I told him no, that I would not give him any deed; that he had sold the Nine Hour, and that he would have no use for any deed from the St. Louis; that I would give him no deed for any part of the St. Louis, or that I would not fulfil my agreement. He had at that time sold the Nine Hour lode. He had sold it to the Montana Company. Neither Mr. Huggins nor Mr. Sterling ever made any demand upon me for any deed.

Cross-examination:

I don't remember the month this conversation was had.
167 It was before the sale of the interest in the Nine Hour. I had heard before that time of his sale of his interest in the Nine Hour, and told him that, having sold it, he had no need for a deed. That was the reason I gave him. It was not the reason in fact. Yes; I gave him one reason and had another. I did not truthfully state to him the reason for declining to make the deed. I think Huggins and Sterling sold their interest a year or two before Mr. Robinson sold; at least that was my understanding.

Redirect examination:

The patent for the St. Louis mining claim had been issued at the time this demand was made on me for the deed.

Here defendants also offer in evidence the certified copy of the patent of the St. Louis mining claim.

WILLIAM MAYGER, recalled for defendants, testified as follows:
I am acquainted with Mr. Robinson, one of the obligees of the bond mentioned in the pleadings, and saw him in the fall of 1887 in Helena, Montana, and had a conversation with him. I afterwards saw him in Marysville.

Here the St. Louis patent was admitted in evidence and marked Exhibit E for defendants.
Defendants rest.

168 JAMES H. HENLEY, recalled for plaintiffs, testified as follows:
I remember the conversation had with Mr. Charles Mayger with myself on the Compromise strip of ground. I don't remember the date. It was somewhere in the latter part of June, 1892, that I was at the Nine Hour shaft and had come up out of that shaft, where I had some men working. I saw Mr. Mayger and Mr. McIntosh measuring along the surface of this hole which was spoken of. Well, I went out to meet the gentlemen, and they had just arrived at the hole at the time I got there. This hole was just south of the Nine Hour shaft—this guy hole where the guy rope is or was; and I asked Mr. Mayger what he was doing. He didn't give me any reply. I asked him a second time, and he told me he didn't want to have anything to do or say to me, and I informed Mr. Mayger that he was on the Montana Company's property, and that he would have to get off. Whereupon Mr. Mayger left and I turned around and went back to the shaft again. He made no claim whatever to me of owning this thirty-foot strip. I could not say from what point he was measuring. He was measuring from the south towards the north—that is, along this line. I don't know the exact distance from the north end to the hole, but it was about fifty feet probably south of the Nine Hour shaft and about six or eight feet above the Compromise ground.

169 WARREN DE CAMP, recalled on behalf of plaintiff-, testified as follows:

We had taken a lease of the ground, but I don't know that we were there working at the date the survey was made. I don't remember seeing surveyors, but I know we were at work. We were there at the shaft or coming off shift when the line was run. We were at work. We sharpened our tools in that blacksmith shop. The shop was then in use.

Cross-examination:

I don't know how many days it took to make the survey. I don't know when we quit work on the Nine Hour claim. It was some time in the fall of 1891. I don't know when the survey was completed for this patent. I don't know whether it was completed after we quit work or not.

ALEXANDER BURRILL, recalled for plaintiff-, testified as follows:

I have heard the testimony here in reference to the St. Louis Company keeping this Compromise ground as a log yard or something of that sort. I saw them unloading a wagon one day on the edge of the strip—I think it was in 1894 or 1893, it might have been in 1893—and half of the timbers that were dropped off the wagon were on the Compromise strip. I ordered Mr. Wilkinson to remove them, and I passed on up to the Black Diamond, and

170 when I came back they were removed. That is all the material I ever knew the St. Louis putting on that strip. They were very close to the apex shaft north. At another time there was a few on the other side south of the apex shaft; that I also ordered removed and they were removed.

Cross-examination:

Q. Was it not in 1894 that you did the work on the Black Diamond?

A. I think it was.

Q. Well, then, this time that you refer to must have been in 1894.

A. I think it was in July, 1893, and the bond expired, I think in July, 1894. It was in that time. I could not say whether it was in 1894. It may have occurred in both years. I took particular pains to keep that ground free from wood. They were using these logs at that time on the St. Louis. I don't know whether they were taking them and using them in the shaft or not. The pile was kept off the line. I know they were keeping off the line.

Q. Don't you know that since 1893 it has been understood that neither party was to interfere with that thirty-foot strip of ground except for development work?

A. What month?

Q. Well, I can't recall the month.

171 A. Since the 19th of June, 1893, there has been understanding that neither party would work that ground except for development purposes; that has been the condition of it

Q. And if these logs happened to get on there it was proper to take them off at that time; they ought to have been taken off?
A. Well, they didn't want to take them off, but they did.

Deposition of George H. Robinson.

Title of Court.

Title of Cause.

Q. What is your name and age, and where do you reside?
A. George H. Robinson; age, 40 years. I reside in Salt Lake City, Utah Territory.
Q. What is your occupation and what have been your facilities for acquiring a knowledge thereof?
A. Civil engineer. My facilities are education and an experience in actual practice for over twenty years.
Q. In what business are you at present engaged?
A. Mining business.
Q. Where were you engaged prior to April 1st, 1893, and in what business were you engaged?
A. I was engaged with the Montana Company, Limited, prior to April 1, 1892.

172 Q. If you were at any time in the employ of the plaintiff in this action or its predecessor in interest, the Montana Company (Limited), will you please state when you first went into its employ?

A. I first went into its employ in year 1885.
Q. How long did you continue in the employment of the Montana Company, Limited, and when did your employment with the Montana Company (Limited) commence?
—. I was in their employ until April 1st, 1893. My employment commenced in 1885.
Q. Are you acquainted *at* what is known as the thirty-foot strip in controversy between the plaintiff and defendants in this action and more particularly described in the complaint herein?
A. Yes.
Q. If you are, how long have you known this piece of ground?
A. During the period I was in the company's employ.
Q. Are you acquainted with its location on the surface?
A. Yes.
Q. How long have you known the location there described?
—. I don't remember. I cannot fix dates of those papers.
Q. If you say you were the civil engineer and mining engineer for the Montana Company (Limited), state when you first became such and what was your business in that connection.

173 A. I was employed as surveyor for the Montana Company, Limited, in 1885. My business in that connection was to look after surveys of the company's property.

Q. Did you look after its mining property for it as such civil and mining engineer?
A. Yes, sir.

Q. Did you also act in the capacity as general manager and superintendent of its business; if so, during what periods of time did you so act?

A. I don't exactly remember the date in which I became the superintendent for the company, however, during my employment under contract with the company, and acted in the capacity of deputy manager.

Q. During the time that you acted as superintendent and manager of the plaintiff's business and while you were acting in the capacity of civil and mining engineer for it, did you on the part of said company or did said company at any time take possession of any portion of the thirty-foot strip of ground in controversy?

A. In reply to this question I desire to state that the thirty-foot strip was recognized by the Montana Company's attorney as being a part and parcel of the Nine Hour Lode claim, as covered within the boundaries of its location, and while it had been patented to the St. Louis Company, the Montana Company claimed under and by virtue of a certain title bond executed *to* the grantors to the Montana Company, and by virtue of taking possession of the
174 Nine Hour Lode claim it was considered that they had taken possession of the thirty-foot strip. I don't know that we ever made any special declaration with reference to this piece of ground as separated from the balance of the Nine Hour lode.

Q. If, in answer to the last interrogatory, you say that a part of its hoisting plant and ore bin was constructed upon said thirty-foot strip, tell how it occurred that any portion of it was constructed thereon.

A. At some time subsequent to the purchase of the Nine Hour lode, the exact date I do not now remember, a portion of the ore bin connected with the hoisting works on the Nine Hour claim was constructed, I beiieve, partially upon the surface ground on that portion known as the 30-foot strip, and we constructed roads for the convenience of working the property across some portion of the surface ground of the 30-foot strip. The answers herein given to these interrogatories are based entirely upon my memory, and inasmuch as I have no written data at hand, I am not able to state that positively.

Q. State whether or not you superintended the construction of the same, and whether it was intended to have lapped over on the said thirty-foot strip.

A. I was manager of the company's property at the time this ore bin was constructed, and as to whether there was any intention of it overlapping any portion of that ground I am unable to
175 state. Mr. Henley, the general superintendent, had immediate charge of such construction, and will be able to state what his intentions were with reference to this construction.

Q. State why it was not removed, if you know.

A. I don't know whether it has been removed since my term of employment ceased with the company or not. It was not removed prior to that date from the fact that it was constructed for use, and was in constant use up to the time that I left.

Q. State whether or not the said plaintiff company ever exercised or attempted to exercise any ownership, possession, or control of that thirty-foot strip while you were in their employ; and, if so, when did it occur.

A. The company assumed control inferentially of the thirty-foot strip by reason of its ownership of the Nine Hour, and I don't know that there was any construction upon the surface of any portion of the claim that would serve as a public declaration of its ownership other than that it was generally understood that the Montana Company had purchased the Nine Hour claim, and the thirty-foot strip was supposed to be embraced within its boundaries.

Q. State, if you can, the exact date when the hoisting plant and ore bin referred to above were constructed.

A. I don't remember the exact date. It was probably a matter of twelve months, possibly more, prior to the 1st of April, 1892.

176 Q. Are you acquainted with what is known as the Nine Hour Lode claim?

A. Yes, sir.

Q. If you are, please describe the same as near as you can.

A. Not having any data or notes as to the description of the Nine Hour Lode claim, I can only state that it is situated on the west slope of Drum Lummon hill, bounded more or less irregularly by the St. Louis claim on the west, the Maskyline Lode claim on the north, the Jeanette and possibly some other lode claims on the east which I don't remember, and while I believe the Robert Emmet location crosses the Nine Hour near its south end line, I am not positive of that.

Q. In purchasing what is known as the Nine Hour Lode claim by the Montana Company, Limited, will you state what particular property — purchased and taken possession of by it?

A. My impression is that the description covered the lot number described and designated by the U. S. surveyor general of Montana in the official survey for patent of the Nine Hour Lode claim.

Q. Was it the Nine Hour Lode claim as described in the patent from the Government of the United States?

A. The description embodied in the deed of transfer was, to the best of my remembrance, coincident as to metes and bounds with the official description described in the patent.

Q. When, if at all, did they first claim anything in addi-
177 tion to the lot of land described in said patent?

A. I don't remember that we ever had occasion to make any declaration as regards to the thirty-foot strip, for the reason that there never was any adverse declaration made to said ground during my connection with the business.

Q. Do you know anything of a bond executed by Charles F. Mayger, the grantee in the patent for the St. Louis mining claim, to one William Robinson, James Huggins, and Frank T. Sterling?

A. Yes; I have seen that bond.

Q. If so, state what you know in reference thereto.

A. I don't know what information is desired with reference to the bond. At one time I had the original bond in my possession.

Its face will show its conditions and terms. Otherwise than this I have no personal knowledge of the controversy leading up to its execution, and hence can say nothing further relative to it than what will appear by reference to the document.

Q. If the Montana Company, Limited, ever purchased any interest in the bonded property from either of them, to your knowledge, state from whom the purchase was made and to whom the deed, if any, was executed.

A. I don't remember that there was ever a deed executed which specifically referred to the bonded strip. I think, however, that

William Robinson did make a deed of transfer to the Mon-
178 tana Company, Limited, possibly to its nominee, for certain unpatented property on Drum Lummon hill, which deed I believe, also covered any and all interests in mining claims or property held by the grantor in the district.

Q. Will you state as near as you can, during the period that you were either civil and mining engineer for the Montana Company, Limited, or acting as its manager and superintendent, — they first laid claim to any portion of this thirty-foot strip mentioned, and explain particularly how this ore bin or hoisting plant happened to be put upon any portion of it?

A. I don't remember that we ever did anything specially with reference to the thirty-foot strip other than the general possession, guarding, and supervision over the surface ground of the Nine Hour claim, and as to the construction of the ore bin upon this ground, it was constructed conveniently in front of the shaft of the Nine Hour claim, and a portion of it, as I believe, overlapped the boundary onto the thirty-foot strip. However, I have never made a survey or seen these lines projected since the construction of this plant, and I don't now state positively that any portion of it is on the thirty-foot strip.

Q. Do you know about the time it was ascertained that a portion of the apex of what was supposed to be the continuation of the Drum Lummon lode or St. Louis Lode claim, as it is called, was ascertained to be upon the thirty-foot strip in question?

A. No; I don't remember; I don't know when the dis-
179 covery was made by actual development. It was always supposed that that apex would be found within some portion of the boundaries of the thirty-foot strip.

Q. Was it about this time that the company represented by you first laid any claim to this property?

A. There never had been any development made upon the surface that would give evidence of the exact position of the outcrop of the apex of the vein during my employment with the company, as far as I can now remember; hence I don't know that there is any connection between the discovery of the apex and any public declaration that might have been made as to the ownership prior to my leaving the company's employ.

Q. Are you familiar with the surface location of the claim of the plaintiff in this action, and more especially the Nine Hour claim?

A. Yes; I am acquainted with the boundaries and lines of both the St. Louis Lode claim and the Nine Hour Lode claim.

Q. Were its surface boundaries so marked as to be readily traced?

A. The surface boundaries of both of the above-mentioned claims are marked by Government corners, and as such may be characterized as being definitely bounded upon the surface, and can be readily traced from corner to corner, which but might perhaps in cases require the use of an engineering instrument.

Q. Have you at any time heretofore pursued the calls of this claim in accordance with the description contained in the
180 United States patent?

A. I have surveyed the Nine Hour Lode claim, determining its boundaries and description by *metes* and bounds as established upon the surface, and will state that this is, as near as I can remember, approximately conformed to the description contained in the United States patent.

Q. Does it include or embrace any of the thirty-foot strip in controversy?

A. My impression is that it does not.

Q. Was it the patented premises that were claimed by the Montana Company, Limited? If so—you say you looked after this branch of the business of the Montana Company, Limited—did you for it, on its account, take possession under any claim of title of anything outside of what is known and designated as the Nine Hour Lode claim?

A. The Montana Company claimed all title held by the vendors in and to the Nine Hour claim, together with all rights of property and appurtenances thereunto belonging, and under the advice of their attorneys it was understood that the thirty-foot strip became a part of the purchase. Replying to the second portion of the question, I will state that the Nine Hour purchase was made under the immediate direction of its resident director, Mr. R. T. Bayliss, who was in the supreme command in America; hence I am not prepared to say what he might have done without my knowledge. With reference to a declaration of possession of this strip of ground,
181 my position being during this period entirely subordinate to the authority of Mr. R. T. Bayliss, I answer this question as above stated for the reason that I was not in the direct official communication with the attorneys of the company or the public. From the above answer to this question it will be understood that my authority to deal with the public was subordinate to Mr. Bayliss, and hence I had no authority to make any public declaration of its claims or policy.

Q. Will you please state what it was that was called and known as the Nine Hour Lode claim by the company you represented?

A. The Nine Hour Lode claim was known as a piece of ground laying upon the surface embraced within the boundaries of that claim as heretofore described.

Q. If it was the patented premises, give the number of the lot and a description of it as near as you can.

A. From memory I will state that the number of the lot was 202. I have no data from which to give a description of the claim.

Q. In speaking of the Montana Company, Limited, and the Montana Mining Company, Limited, state, if you know, what time the Montana Company, Limited, ceased to operate the mining operations and when the Montana Mining Company, Limited, took charge of and operated the same.

A. I don't know at what date the official change was made transferring the business of the Montana Company, Limited, to
182 the reorganized company, known as the Montana Mining Company, Limited. I think the change was being inaugurated at the termination of my employment, but whether it was completed or not I don't remember.

Q. Can you state whether or not the thirty-foot strip in controversy is embraced in the description of the St. Louis Lode claim as patented by the Government of the United States?

A. I suppose that the thirty-foot strip is embraced within these limits.

Q. State anything else you may know pertaining to this controversy beneficial to the defendants in this action.

A. I don't know of anything but what I have already stated.

Q. At the time of the purchase of the Nine Hour Lode claim by the Montana Company, Limited, or its agents, was it known by the said Montana Company, Limited, or its agents that Frank P. Sterling, James Huggins, and William Robinson had a bond for a deed of the thirty-foot strip?

A. The arrangement for the purchase and transfer of the Nine Hour lode was made by Mr. Bayliss and Messrs. Cullen and Saunders, attorneys, of Helena, who were employed to examine the title and draft the necessary papers to complete the transfer. I have no means of knowing whether they had definite knowledge of the bond transaction running to Frank P. Sterling, James Huggins
and William Robinson, but I am inclined to believe that
183 they were acquainted with all the facts.

Q. Was it known that the thirty-foot strip belonged to or was a part of the Nine Hour Lode claim in any way or purchased as a part of it?

A. My understanding was that the thirty-foot strip was considered as being a part of the Nine Hour Lode claim, and that conveyance of complete title would be made upon perfection of the St. Louis patents.

Q. When did it, the Montana Company, Limited, first find out about this bond for the said thirty-foot strip?

A. I don't know.

Q. What officers of the company, if any, did you hear speak of the thirty-foot strip not being included in their conveyance?

A. I will state that the question of title to the thirty-foot strip was discussed by myself and Mr. Cullen several times.

Q. State as near as you can the date of this talk.

A. I cannot specify dates, as our consultations relative to com-

pany business took place from time to time as required, covering a period of several years.

Q. Was there any work or excavations of any kind whatever done upon this thirty-foot strip while you were the civil and mining engineer of the company or its manager, except the small portion of the ore bin which was done through mistake?

184 A. I have not stated that any portion of the construction placed upon the thirty-foot strip was placed there by mistake, but other than the road excavations, the removal of the ore dump, and the construction of a powder magazine I don't remember that there was any other work done during my connection with the property on the surface of the ground.

Q. State in your own language everything in connection with the erection of that house and ore bin and whether the Montana Company, Limited, had any other kind of possession of said thirty-foot strip during the time that you were connected with it.

A. I believe in answer to the foregoing questions in detail I have already stated all of the facts relative to the construction of the Nine Hour hoisting works and ore-house and roads and powder magazine; that there is nothing further that I can add relative to this construction.

Q. If you have not already done it, give the exact date when this ore bin was constructed.

A. I am unable to give the exact date the ore bin was constructed. I have no memoranda and don't happen at this time to recollect any event or transaction that would fix the date.

GEORGE H ROBINSON.

Duly verified.

185 Cross-examination:

Cross-int. 1. Did not R. T. Bayliss purchase the Nine Hour claim and you first learn of this purchase through his letter to you of March 4th, 1886?

Answer. I do not know: the letter books will show.

Cross-int. 2. Did you not June 11th, 1887, write to Mr. Bayliss at Marysville for transmission to the company at London a letter enclosing abstract of title of the Nine Hour and other claims and state in abstract of Nine Hour claim that "conflict between it and St. Louis claim was settled by parties then interested in these claims and the settlement provided that the ground shall be divided as shown on large-scale surface plan," and was not said large-scale surface plan made by you, and did it not show the Compromise strip as belonging to the Montana Company as part of the Nine Hour claim?

A. My answer to that is I do not know; the plans and correspondence will show.

Cross-int. 3. Did you not make and transmit to the company at London a copy of said large-scale map so showing it? Do you know that it was sent?

A. My answer to that question is just the same as the other one; their records will show whether I did or not.

Cross-int. 4. Did you not in note book marked "Abstract of property owned or controlled by the M. Co., L., 1887," write with
186 reference to Compromise strip, "there is a strip of ground near the Nine Hour shaft 30′ wide that follows the St. Louis title, and in settlement in court proceedings Mayger gave Nine Hour owners a bond for deed *with* patent should issue; that deed has not yet been executed," and add thereto, "up to January 1, 1889"?

A. My answer to that question is that I do not know. The note book in question will show it.

Cross int. 5. Did you not on September 20th, 1888, in survey book kept by you known as the red book, containing survey of Nine Hour claim, draw sketch at page 112 showing Compromise strip excluded from St. Louis claim and included in Nine Hour claim as belonging to Montana Company?

A. I do not know. A reference to red book in question will show.

Cross-int. 6. Did you not on Appendix A to the review of John R. Parks' testimony on petition for survey, written by you, make a sketch dated thereon October 15, 1889, showing the compromise strip excluded from St. Louis claim and included in Nine Hour claim and as belonging to Montana Company?

A. I do not know. Reference in this case to the appendix mentioned will show.

Cross-int. 7. Did you not make the working map of Montana Company's property, known as the "sixty-feet-scale map," to keep in company's office at Marysville and draw thereon the Com-
187 promise strip as included in the Nine Hour claim and as belonging to the Montana Company, said map showing work from 1884 to 1889, and did you not write thereon, on the Compromise strip, these words: "Compromise ground belonging to the Montana Company, Limited"? If so, when did you write this?

A. I do not know at what date the map in question was made. It is a fact that I made it. It is also true, in reply to all of the interrogatories hereinbefore stated, that all maps and papers of the Montana Company and all note books of mine have recognized the Compromise strip as belonging to the Montana Company.

Cross-int. 8. Did you not make one-hundred-foot-scale map, dated January 15, 1890, on which you traced the Compromise ground and showed it as included in the Nine Hour claim and as belonging to the Montana Company, and was not this map so showing this introduced in evidence on trial between St. Louis Company and Montana Company in U. S. circuit court at Helena, Montana, in the month of May, 1893?

A. Reference to this map will show whether or not the Compromise ground was shown as stated in cross-interrogatory.

Cross-int. 9. Did you not upon all of the maps showing property of the Montana Company, made by you or under your direction, and in all reports made by you from 1887 to 1893, show Compromise ground as included in Nine Hour claim and as belonging to
188 the Montana Company?

A. My answer to that question is yes; and it is also true that at various times during my connection with the Montana Company and in consultation with the various officers of the company that I always contended that, while the property was ours by right, that our paper title was not as complete as I desired to have it.

Cross-int. 10. Did you not on or about September, 1889, take J. H. Henley, mine superintendent of the Montana Company, over surface of company's property, including the Nine Hour claim, and in it the Compromise strip, and point out to him for his guidance in working and taking charge of said company's property the Compromise ground as part of the Montana Company's property, and say to him that the company owned it, and that the compromise between the owners of the St. Louis Company and the Nine Hour conceded this to the Nine Hour claim, and did you not point out to him a line of boundary stakes set by your direction running along the west side of this Compromise ground as the west boundary of the Nine Hour claim?

A. My reply is that at some date, which I cannot now fix, I did put Mr. James Henley in possession of all the data relative to the company's property, in order that he might assume superintendence thereof. As to the Compromise property, while it is possible I did point out this ground especially to him, I do not have any
189 remembrance on that point. It is not, however, a fact that I showed him any stakes standing upon the west boundary of this strip, for the very reason that I never set any or caused any to be placed there, to the best of my remembrance and belief. The stakes bounding the Montana Company'- property, which is represented by the west side line of the Nine Hour claim, were only set as far south as corner No. 2.

Cross-int. 11. Did you not between September 17th, 1889, and April 1st, 1893, frequently go over the surface of the ground with said Henley, and several times say to him that the Compromise strip belonged to the Montana Company, and that he should not permit any one else to work thereon?

A. This is probable, and I will leave the matter to Mr. Henley as to whether I did or not.

Cross-int. 12. Did you not make for said Henley a tracing for the one-hundred-foot-scale map referred to in cross-interrogatory 8, showing Compromise ground as belonging to the Montana Company, said map to be used by him in conducting the work of the company?

A. I do not remember whether I did or not. However, I presume it is true that Mr. Henley was in possession of such map.

Cross-int. 13. Did you not instruct John Herron to make copy of one-hundred-foot-scale map for Alexander Burrill, surface superintendent of the Montana Company, to be used by him in discharging his duties, as showing Montana Company property
190 to include the Compromise ground?

A. I do not remember.

Cross-int. 14. *Do* you not, at the time of the construction of the

shaft-house and ore bin on Compromise ground, instruct Alexander Burrill to place the same there and say to him, in that connection, the Compromise ground on which they were placed belonged to the Montana Company?

A. I do not remember whether I did or not, nor do I know positively whether any portion of said ore bin or works are upon the Compromise ground. However, I do not consider, if it was upon this ground, that we were outside our rights.

Cross-int. 15. Did you not in the early part of 1888 visit Dr. R. W. Raymond, in New York city, New York, to counsel with him on behalf of the Montana Company in hopeful litigation pending in the United States circuit court of Montana and exhibit to him maps of the Montana Company property, showing Compromise strip as included in Nine Hour claim and as belonging to the Montana Company, and did you not then and there to Dr. Raymond state that the Montana Company owned the Compromise ground, and discuss with him the bearings of this fact on the apex litigation, and did you not at the same time discuss the expected litigation between the St. Louis Company and the Montana Company, and in that connection make the same statement about ownership of Compromise ground?

A. While I visited Dr. Raymond at some period, which I do not now remember, and discussed all of the questions herein
191 raised, I do not remember what maps I used or whether I discussed the bearing of the contract ground upon the apex question or not. As previously stated, both in my direct and cross-interrogatory examination, in this connection, I stated that Mr. R. T. Bayliss was in supreme command of the Montana Company; that I was acting under his orders, and for that reason I was not in a position to make a public declaration of the Montana Company's business or policy. While I always recognized the fact that the Montana Company had purchased such rights as were conveyed by a certain deed and bond executed for the property, it is also a fact that I always objected to the description therein contained, and contended that the contract strip was not duly embraced within the boundaries as described in the deed of transfer to the Montana Company. I insisted many years ago that action should be brought for the correction of this title. It is also a fact that, in the construction of all maps and plans for the Montana Company with reference to surface boundaries and title to the property, I acted under the direction of the attorneys of the company as to what property should be embraced within *in* our side lines. I did not in these cases exercise my individual judgment.

GEORGE H. ROBINSON.

Duly acknowledged.

The foregoing contains all the testimony given on the trial of said cause.

192 Whereupon the defendants in said action ask the court to find respectively and severally the following facts:

Title of Court.

Title of Cause.

Now come the defendants in the above-entitled action and ask the court to make the following findings therein, to wit:

I.

The mesne conveyances by which plaintiff asserts title to the thirty-foot strip described in the complaint do not include said strip therein.

II.

That said plaintiff never acquired any title to the said thirty-foot strip by reason of any of said mesne conveyances.

III.

The assignment of said bond by said Robinson to the predecessors in interest of said plaintiff does not transfer the interest or any of the interest of the other obligees therein.

IV.

That it was the intention of the said parties to said bond that the deed therein mentioned should be made to the obligees therein and not to said Robinson individually, and that the failure to insert the names of the other obligees was by mutual mistake.

193

V.

That said Robinson demanded of the said defendant, Charles Mayger, a deed for said thirty-foot strip in the month of ——, A. D. 1887, and that said Mayger failed and refused to execute the same.

VI.

That no other demand for a deed was made by said plaintiff or its predecessors in interest except the demand alleged and set forth in plaintiff's complaint.

VII.

That the said bond sued on constitutes the only agreement between the parties for the execution of the deed prayed for in plaintiff's complaint.

VIII.

That the possession of the said thirty-foot strip, with the exception of the portion thereof occupied by the ore bin and powder magazine, has ever since the survey and marking of the boundaries of the St. Louis mining claim and the obtaining of a patent therefor *has* been in the said defendant company and its grantor.

IX.

That the bond sued on and procurement of the said St. Louis patent, as set out in plaintiff's complaint, is against public policy and against the policy of the law applicable in such cases.

194 X.

That plaintiff's predecessors in interest aided in the procurement of said patent for said St. Louis Lode mining claim, as alleged in its complaint.

As conclusions of law the court finds:

I.

That said bond is void, as against public policy and the policy of the law applicable thereto, and that the specific performance thereof as prayed for in plaintiff's complaint, will not be enforced.

II.

That said plaintiff is not entitled to a conveyance *for* said defendant company for said premises or any portion thereof.

III.

That its rights of action to enforce specific performance of said bond is barred by the statute of limitation, on account of which said plaintiff is not entitled to any relief.

IV.

That since the application for a patent, the surveying and staking off of the St. Louis claim and the patenting of the same, including the thirty-foot strip in controversy, said strip ceased to be a part of said 9 Hour Lode claim, and that all conveyances made subsequent thereto of said 9 Hour Lode claim do not include or embrace said thirty-foot strip.

W. W. DIXON.

195 McCONNELL, CLAYBERG & GUNN
TOOLE & WALLACE.

And after argument the said court made the following findings of fact:

Title of Court.

Title of Cause.

Findings of Fact by the Court.

I. That the plaintiff and the defendant The St. Louis Mining and Milling Company of Montana are and each of them were at the date of the commencement of this action corporations doing business in the State of Montana.

II. That on the 7 day of March, A. D. 1884, William Robinson, James Huggins, F. P. Sterling, Warren De Camp, and John W. Eddy were the owners of, in possession, and entitled to the possession of all and singular the Nine Hour Lode claim, situate, lying, and being in the Ottawa (unorganized) mining district, in the county of Lewis & Clarke, State of Montana, and that the strip of ground called the "Compromise ground," which is the subject of dispute

this action, was at that time and thereafter continued to be a part of said Nine Hour Lode Mining claim.

III. That prior to the date last aforesaid the said Charles F. Mayger had made application in the United States land office at Helena, Montana, for a patent to the St. Louis Lode mining claim,
196 and had included in his application the said ground which is the subject of dispute in this action, and that thereupon the said Robinson and Huggins had made and filed in the land office a protest and adverse claim to the ground in dispute, and an action had been instituted within the statutory time to determine the right to the possession of said premises in dispute and as to whom had the right to obtain patent therefor; which said action at said last aforesaid date was pending in the district court of the third judicial district of Montana within and for the county of Lewis & Clarke; that on said seventh day of March, A. D. 1884, the said Robinson, Huggins, and Sterling and the defendant Charles F. Mayger entered into the bond or obligation attached to the complaint herein, marked "Exhibit A," and that said obligation or bond was made and given for the purpose of settling and determining the action aforesaid and the controversies involved therein, and for the purpose of determining and fixing the boundary line between the said Nine Hour Lode mining claim and the St. Louis Lode mining claim, owned by the said Mayger, the boundaries of which claims were in conflict, as aforesaid.

IV. That thereupon said suit was dismissed and the said adverse claim was withdrawn in said land office, the said Robinson, Huggins, and Sterling performing on their part all of the terms and conditions of said contract to be by them performed.

V. That at the date of the execution of the said bond the
197 said Robinson, Huggins, Sterling, Eddy, and De Camp were in the actual possession of the said Compromise strip, and they and their successors in interest have ever since remained in the possession thereof, claiming and holding the same as a part of their said Nine Hour Lode mining claim.

VI. That at the date of the execution and delivery of the said bond it was expressly agreed between the parties thereto that all of the ground lying to the east of the westerly line of the Compromise strip should be a portion of the Nine Hour Lode mining claim.

VII. That the plaintiff herein is the successor in interest of the said Robinson, Huggins, and Sterling, the obligators named in said bond, and is also the successor in interest of Warren De Camp and John W. Eddy, who were cotenants with the said obligees in said premises at the date of the execution of said bond.

VIII. That the conveyances introduced in evidence on the part of the plaintiff embrace and were intended to include the said Compromise ground, and conveyed to the respective grantees therein named all of the interest, legal and equitable, which the said grantor or grantors had in said premises at the date of the execution thereof, and it was the intention of the parties to the deeds to convey as well their interest in said Compromise strip as every other part and parcel of the said Nine Hour Lode mining claim.

198 IX. That on or about the — day of July, A. D. 1893, the said plaintiff, as the assignee of the said Robinson, Huggins, and Sterling, duly demanded a deed of the said Compromise strip of ground of and from the said defendant, but the said defendant refused to execute such deed, and that no demand for such deed had ever previously been made upon the said Charles F. Mayger by the said plaintiff or any of its predecessors in interest.

X.

That on or about the 10th day of June, A. D. 1893, the defendant Charles F. Mayger assumed to convey the said Compromise strip to his codefendant, The St. Louis Mining and Milling Company of Montana, but at the date of said conveyance the said defendant, The St. Louis Mining and Milling Company of Montana, had full notice and knowledge of the equities of the plaintiff in and to said Compromise strip and its possession thereof.

XI.

That the defendants wrongfully assert title to the ground in controversy, and thereby cloud the title and estate of the plaintiff therein, and that the plaintiff has a right to have such cloud removed from its title to the premises in controversy.

XII.

That the court finds all of the issues raised by the pleadings in this case in favor of the plaintiff and against the defendants.

199 *Conclusions of Law.*

I.

The plaintiff is entitled to a conveyance from the said defendant of and for the premises particularly mentioned and described in the said bond, known as the "Compromise ground."

II.

That the said defendants and each of them should be enjoined and perpetually restrained from asserting any right, title, or interest of any kind or character in or to the said Compromise ground or any part or portion thereof, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

Dated June 1st, 1895.

HORACE R. BUCK, *Judge.*

As to the refusal to find as requested by said defendants, and to the findings as made as aforesaid, and each and every one respectively and severally, the defendants then and there excepted.

And upon the said findings the court rendered the following decree:

Title of Court.

Title of Cause.

200 This cause came regularly on to be tried on the 10th day of May, A. D. 1895, Charles J. Hughes, Jr., M. Kirkpatrick, and Cullen & Toole appearing for the plaintiffs, and Messrs. W. W. Dixon, Toole & Wallace, and McConnell, Clayberg & Gunn appearing for the defendants. A jury having been expressly waived by the parties, the issues raised by the pleadings herein were tried to the court sitting without a jury, and after the introduction of testimony on the part of the plaintiff and on the part of the said defendants and the argument of counsel, and after due deliberation, the court having duly made and filed on the first day of June, 1895, its findings of fact and law in said case, and the issues having been found in favor of the plaintiff and against the defendants, and that the plaintiff is the owner of the equitable and entitled to the conveyance from the defendants of the legal title to the premises mentioned in the complaint and hereinafter described:

Now, therefore, on motion of counsel for plaintiff, it is—

Ordered, adjudged, and decreed that the agreement set forth in the complaint herein, a copy whereof is attached to the said complaint as an exhibit, be specifically performed, and that the defendant The St. Louis Mining and Milling Company of Montana, within thirty days from and after the entry of this decree, execute and deliver to the said plaintiff a good and sufficient conveyance in fee-simple, absolute, free from all incumbrance of and for the
201 premises mentioned in the complaint and hereinafter described. The said conveyance shall be in form like the one hereunto annexed, and upon the failure of said defendant within the time aforesaid so to make, executed, and deliver such conveyance, then the clerk of this court is hereby appointed a commissioner, who, in the name of and for and on behalf of said defendant, The St. Louis Mining and Milling Company of Montana, is hereby directed to execute a deed to said plaintiff for said premises, which, after reciting that it is so executed by said clerk as such commissioner for and on behalf of said defendant, shall be in form substantially like the one hereto attached and approved, and upon recording a duly certified copy of this decree and of the said deed so executed by said commissioner in the office of the county recorder of the county of Lewis & Clarke and State of Montana, the same shall have the force and effect of a conveyance of the said title from the said defendants to the said plaintiff; that the said defendants and all persons claiming under them or either of them be forever barred from all interest or claim to the said premises, or to any part or portion thereof, or the possession of the same or any thereof.

The premises affected by this decree and so to be conveyed are more specifically bounded and described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the 9 Hour lode bears south 39° 32′ east, said course
202 being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant, thence

north 50° 28′ east on a line parallel to the aforesaid boundary line of the St. Louis Lode claim, between corners two and three, two hundred and twenty-six (226) feet to a point on the boundary line of the St. Louis Lode claim between corners one and two; thence south 20° 28′ west along the line of said boundary, between corners one and two, 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46° 10′ west along the line of boundary of said St. Louis claim, between corners three and four, thirty feet distant to a point; thence north 50° 28′ east along a line parallel to the boundary line of the St. Louis Lode claim, between corners two and three, 230 feet to the point of beginning, including an area of about 12,844.5 feet, together with all the mineral therein contained.

It is further ordered and adjudged that the plaintiff do have and recover from the said defendant its costs in this behalf sustained, taxed at the sum of — dollars.

And that the plaintiff have execution therefor.

June 1st, 1895.

HORACE R. BUCK, *Judge.*

Duly filed.

203 This indenture, made and entered into this — day of — in the year of our Lord one thousand eight hundred and ninety-five, between the St. Louis Mining and Milling Company of Montana, an incorporation duly organized under the laws of the State of Montana, the party of the first part, and the Montana Mining Company, Limited, an incorporation duly organized under the laws of the Kingdom of Great Britain and Ireland, the party of the second part,

Witnesseth: That the said party of the first part for and in consideration of the sum of one dollar, lawful money of the United States of America, to it in hand paid, the receipt whereof is hereby confessed, has granted, bargained, sold and remised, released and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release and forever quitclaim unto the said party of the second part and to its assigns, forever, all and singular those certain premises, situate, lying and being in Ottawa unorganized mining district in the county of Lewis & Clarke and State of Montana, more particularly bounded and described as follows, to wit:

Commencing at a point from which the center of the discovery shaft of the 9 Hour lode bears 39° 32′ east, said course being at right angles to the boundary line of the St. Louis lode, between corners two and three, fifty feet distant; thence north 50° 28′ east, on a line

204 parallel to the aforesaid boundary line of the St. Louis Lode claim between corners two and three, two hundred and twenty-six feet to a point on the boundary line of the St. Louis Lode claim between corners one and two; thence south 20° 28′ west along the line of said boundary between corners one and two 60.5 feet to corner No. 2; thence 403 feet to corner No. 3 of the St. Louis lode; thence north 46° 10′ west along the line of boundary of said St. Louis Lode claim between corners three and

four, thirty feet distant to a point; thence north 50° 28′ east along a line parallel to the boundary line of the St. Louis Lode claim between corners two and three 230 feet to the point of beginning including an area of about 12,844.5 feet, together with all the mineral therein contained.

Together with all the dips, spurs and angles and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appended and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances, thereto belonging, or in anywise appertaining, and the rents, issues and profits therein, and also all and every right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the said premises
205 together with the appurtenances and privileges thereto incident, unto the said party of the second part and its assigns, forever.

In witness whereof, the said party of the first part by resolution of its board of trustees has caused its president and secretary to subscribe these presents for said corporation, and to affix hereto its corporate seal the day and year first above written.

——— ———.
——— ———.

The foregoing form of deed is hereby approved as being the deed in form directed to be made, executed, and delivered by the said St. Louis Mining and Milling Company of Montana, to the Montana Mining Company, Limited, mentioned in the foregoing decree. The said deed when so executed and before delivery to be properly acknowledged before some officer authorized to take the acknowledgment of such instrument.

HORACE R. BUCK, *Judge*.

And thereupon and on the 10th day of June, 1895, and within the time prescribed by the statutes, said defendants filed the following notice of motion for a new trial:

206 Title of Court.

Title of Cause.

To the above-named plaintiff and Mess. Cullen & Toole, M. Kirkpatrick, and Chas. J. Hughes, its attorneys:

You are hereby notified and informed that the defendants in the above-entitled action intend to move for a new trial therein, in accordance with the statute in such case provided, upon the following grounds, viz:

I.

Accident and surprise, which ordinary prudence could not have guarded against.

II.

Newly discovered evidence material for these defendants.

III.

Insufficiency of the evidence to justify the findings and decision of the court, and that the same are against law.

IV.

Errors of law occurring at the trial and excepted to at the time by these defendants.

Said motion will be made upon affidavits, bill of exceptions, and statement of the case.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Defendants.

207 Service of the foregoing motion and receipt of copy of same duly made and accepted this 10th day of June, A. D. 1895.

M. KIRKPATRICK,
CHAS. J. HUGHES, JR., &
CULLEN & TOOLE,
Attorneys for Plaintiff.

208 And thereafter the said court extended the time for filing said motion and statement on motion for a new trial up to and inclusive of the 13th day of July, A. D. 1895.

And now come the said defendants and, in pursuance of their said notice and within the time allowed by the court for that purpose, *and* move the court for a new trial herein.

And for specifications of error show unto this honorable court here the following—

Errors of Law Occurring at the Trial and Excepted to at the Time by These Defendants.

a. The court erred in admitting the testimony of William Robinson in regard to the discovery, location, and staking out and recordation of the Nine Hour Lode claim, and also the evidence of the said Robinson showing or tending to show that the location of the St. Louis Lode claim never embraced any portion of the thirty-foot strip in controversy, 1st, for the reason that the complaint in this case does not state facts sufficient to constitute a cause of action or to authorize the relief demanded or any relief; 2, because the patent itself in this action is conclusive evidence that all the necessary

steps for its procurement have been taken; 3rd, because the patent carried with it the legal title and possession of the premises, which cannot be the subject of dispute subsequent to its issuance.

209 *b.* The court erred in admitting evidence of posting of notices upon said claim upon the location thereof for the reasons aforesaid.

c. The court erred in admitting the testimony of said Robinson showing or tending to show that the said thirty-foot strip in controversy was never in any manner included in the location of the St. Louis claim for the reasons heretofore given, and also for the reason that the patent to the St. Louis Lode mining claim, as alleged in the complaint and admitted in the answer, and the title thus claimed is the title sought to be acquired, and for the reason that the said patent is conclusive in this action as to the staking, discovery, possession, and all other antecedent steps necessary for its procurement, and for the reason that the complaint in this action does not state facts sufficient to constitute a cause of action or to authorize the relief demanded or any relief whatever, and because the agreement therein set forth is contrary to public policy and the policy of the laws of the United States with reference to acquisition of titles to mineral lands.

d. The court erred in admitting testimony tending to show knowledge upon the part of the said Mayger of the location of the said Nine Hour lode; also as to whether or not the said Maygers at that time made any claim to said property, or that it was in conflict with the St. Louis Lode claim.

210 *e.* The court erred in admitting testimony tending to show or showing that the St Louis claim never included the thirty-foot strip in controversy, for the reason that the patent admitted in the pleadings is conclusive evidence of said facts.

f. The court erred in permitting testimony showing or tending to show that the said defendants or either of them were never in possession or entitled to possession of the said thirty-foot strip or was included in said St. Louis patent, for the reason that the patent is conclusive evidence of said facts and carried with it the possession of said premises, and that the bond sued on is contrary to public policy and the policy of the mineral land laws.

g. The court erred in admitting evidence showing or tending to show that the predecessors in interest of the said plaintiff company worked upon said premises in controversy, for the reasons aforesaid.

h. The court erred in permitting testimony showing or tending to show that the defendant Charles Mayger or the said defendant company never did any work upon the said thirty-foot strip of ground, for the reason that the same is incompetent and immaterial.

i. The court erred in admitting any and each of the deeds by plaintiff's predecessors and grantors respectively admitted in evidence, for the reason that the said deeds do not show any conveyance whatever of the thirty-foot strip of ground in controversy.

211 *j.* The court erred in permitting oral testimony as to what was conveyed by said deeds.

k. The court erred in admitting the testimony of De Camp, showing or tending to show that the thirty-foot strip of ground in controversy never was embraced in the location of the St. Louis lode, and that the patentees in said St. Louis patent were never in the possession or occupation of said premises, for the reasons heretofore and the additional reasons that the plaintiff claims title and asks a conveyance by reason of the title acquired by the St. Louis patent and aided and assisted in procuring the same, and are estopped from denying any legitimate consequences resulting from said patent, among which are the acts and things required to be done under the statutes of the United States and the State of Montana.

l. The court erred in admitting the notice of location of the St. Louis Lode claim, for the reasons heretofore given.

m. The court erred in admitting the location notice of the Nine Hour Lode claim, for the reasons heretofore given.

n. The court erred in admitting the certified copy of the mortgage from Huggins to William Robinson, for the reason that the loss of the original had not been properly established and the said copy was incompetent and irrelevant for any purpose; also the mortgage from Huggins to Sterling for the same reasons; also the sheriff's deed for the same property for the same reasons;

212 also the deed from Huggins to Sterling, and for the additional reason that the said alleged muniments of title did not convey any interest in the premises, the same being for a portion of the Nine Hour lode, and for the reason that the same was included in the patent to the St. Louis lode.

o. The court erred in admitting the deed from Huggins to De Camp and from Huggins to Robinson, marked Exhibits Eight and Nine for plaintiff; also the deed from Sterling to Eddy, and each and every one of the mesne conveyances to plaintiff, for the reasons aforesaid and for the reason that the said conveyances separately and severally and none thereof conveyed to the said plaintiff the premises in controversy or any part thereof.

p. The court erred in admitting in evidence the assignment by William Robinson of the bond in suit, for the reason that the said bond is not assignable, in that it was executed to James Huggins, William Robinson, and Frank P. Sterling, and that the assignment of William Robinson does not therefore effectuate an assignment of any interest in the bond, he being a trustee therein as to the other parties, and for the reason that it is patent upon the face of said bond that the said Huggins and Sterling were beneficiaries therein, who had conveyed their interest in said premises to the defendant company and its grantors, and for the further reasons heretofore assigned in the record.

213 *q.* The court erred in admitting the deed in evidence from Bratnober to Bayliss, and from Bayliss to the Montana Company, Limited, and from the Montana Company, Limited, to the plaintiff herein, for the reason that said deeds conveyed no interest whatever in the thirty-foot strip in controversy.

r. The court erred in admitting the testimony of Alexander Burrill that George H. Robinson pointed out to him the premises in controversy as the property of the plaintiff company.

s. The court erred in permitting testimony showing or tending to show that the premises in controversy were platted upon the maps of plaintiff's records as the property of said plaintiff, for the reasons aforesaid and for the reason that the same is hearsay and incompetent testimony.

t. The court erred in admitting testimony showing or tending to show that said Robinson pointed out to the said witness, Alexander Burrill, the stakes defining the boundaries of the said thirty-foot strip, for the reasons aforesaid and for the reason that the same is hearsay and incompetent and irrelevant testimony.

u. The court erred in admitting the testimony of the said witness, Burrill, showing or tending to show that he forbid the defendants from working upon said thirty-foot strip, as the same is incompetent and immaterial and does not establish or tend to establish the character of the title alleged in the pleadings and necessary to support this action.

214 *v.* The court erred in admitting the testimony of John Herron that the thirty-foot strip was embraced in the maps of the plaintiff company's property, and which was sent to the plaintiff company.

w. The court erred in permitting evidence to show that said maps so platted and platting said property as plaintiff's property were sent to its office in London.

x. The court erred in admitting the declarations of the agents of plaintiff as to its (plaintiff's) ownership of said property, for the reasons aforesaid and for the reason that it is not shown that the parties making such declarations were predecessors in interest of the said plaintiff.

y. The court erred in admitting the testimony of John Herron showing that the maps included the Compromise ground as a part of the Montana Company's ground to be introduced in evidence, first, because said complaint does not state facts sufficient to constitute a cause of action or authorize any equitable relief, and because the complaint sued on is contrary to public policy and in violation of the policy of the mineral land law; second, because the patents conceded by the pleadings are conclusive evidence of the claims and descriptions of the claims; third, because it is admitting acts of the parties to establish title in this, thereby manufactur-

215 ing testimony to support their case, and because it is a transaction between the agents of the same company; and for the reason that there is no authority shown on the part of the agents to bind the company one way or the other, and, consequently, no mutuality in the transactions or declarations.

z. The court erred in admitting testimony to show or tending to show that the maps were turned over from one officer to another of the plaintiff company, as showing or tending to show title to the property in controversy as defined by said maps, for the reasons aforesaid, and for the further reason that the statutes of the State

authenticate records of this character only when turned over by certain public officers, and which does not include the officers of the plaintiff company.

aa. The court erred in admitting testimony of James Henley showing or tending to show that one George H. Robinson pointed out the lines of the plaintiff company's ground to him, and in permitting him to indicate the same upon the map, for the reason that the same is hearsay and incompetent for any purpose, for the reasons heretofore assigned.

bb. The court erred in permitting the witness Bayliss to state what Mr. Burrill had told him, for the reason that the same was hearsay evidence.

cc. The court erred in overruling the said defendants' motion for a nonsuit herein, upon the ground specified and set forth in said motion, to which reference is made.

216 *dd.* The court erred in refusing to strike out certain testimony on the motion of the defendants, as appears by reference to the record herein, for the reasons set forth in the objections to said testimony when offered.

ee. The court erred in excluding the testimony of Charles Mayger, offered for the purpose of showing the mistakes in the bond, in that the deed from the said Charles Mayger was to be made to the said William Robinson, Frank P. Sterling, and James Huggins, under objections of plaintiff, for the reason that the same is a material issue in said cause and tended to explain and show the extent of the interest conveyed by said Robinson to said plaintiff by the assignment of said bond, and showed and tended to show the interest of the said defendant company in said premises by reason of its purchase of the interest of said Sterling and Huggins.

ff. The court erred in finding that William Robinson, James Huggins, Frank P. Sterling, Warren De Camp, and John W. Eddy were the owners and in possession and entitled to the possession of the premises in controversy, and that the same continued to be a part of the Nine Hour Lode claim, for the reason that the evidence is insufficient to support said fact, in that there is no testimony to support such finding, and for the reason that the patents introduced in evidence are conclusive against said finding.

217 *gg.* The court erred in making finding three herein, for the reason that there is no patent evidence to support the same, and for the reason that the respective patents are conclusive as to the facts therein found, and for the reason that the said finding under the pleadings in this case should and ought to show that the said agreement was contrary to public policy and the policy of the mining laws of the United States, and for the reason that the same involves a Federal question and does not show under the pleadings that there was any substantial controversy as to the right to said premises, and for the reason that the evidence and allegations of the complaint show that the said agreement referred to in said finding is against the policy of the United States land laws and invalid, and therefore insufficient to support said finding.

hh. The court erred in making finding four, for the same reasons.

ii. The court erred in making finding five, for the reason that the evidence shows the possession of thirty-foot strip to have been in said defendant company and its predecessors in interest, and for the further reason that the said patent for the St. Louis mining claim carried with it the possession and right of possession to the same, and for the reason that the predecessors in interest of the said defendants were the owners of said premises, and for the reason that the predecessors in interest of the said plaintiff, while the
218 owners of said premises, by reason of their said agreement are estopped from disputing the title and possession and right of possession conveyed by said patent to the said St. Louis mining claim, on account of which the evidence is insufficient to support the finding.

jj. The court erred in making finding six, for the reason that the evidence is insufficient to show, and there is no evidence showing or tending to show, that at the date of the execution and delivery of the said bond it was stipulated or expressly agreed between the parties thereto that the said ground in controversy should be a portion of the Nine Hour Lode claim, and for the reason that the patent to the St. Louis Lode claim shows the contrary to be the fact, and for the reason that the said agreement introduced in evidence is the only competent testimony in reference thereto, which, in connection with the said patent, shows the evidence to be insufficient to support the said finding.

kk. The court erred in making finding seven, for the reason that the evidence is insufficient to support the same, in that the said Huggins and Sterling conveyed their interest to the said defendant company's grantor, and for the reason that all the rights of the said Huggins or Sterling in and to the said thirty-foot strip in controversy as a part of the Nine Hour Lode claim became extinguished and the said claim was included in the said St. Louis patent,
219 and for the reason that the said St. Louis patent shut off all transfers theretofore made on account of any title held by either said Robinson, Huggins, or Sterling to the said thirty-foot strip as a part of the said Nine Hour claim, and for the further reason that the evidence shows that said defendant, Robinson, if he could convey at all, could only convey his interest in the said thirty-foot strip, on account of which the said evidence is insufficient to show that the plaintiff is the successor in interest of the said Robinson, Huggins, and Sterling.

ll. The court erred in making finding eight that the conveyance or deeds introduced in evidence on the part of the plaintiff embraced and included and were intended to include the Compromise ground and conveyed to the respective grantees therein named all the legal and equitable title that the grantors had in said premises at the dates of the execution thereof, for the reason that the deeds to the said plaintiff company and its predecessors in interest do not include in their description the calls or premises in controversy, and for this reason the evidence is insufficient to support said finding.

mm. The court erred in making finding ten that the St. Louis

Mining and Milling Company had full notice or knowledge of the equities of the plaintiff in and to the said premises and Compromise strip aforesaid and its possession thereof, for the reason
220 that the evidence shows that it had no notice of any claim of the said plaintiff to said premises, and that the deeds of conveyance of record showed that the said conveyances to the said plaintiff did not include the thirty-foot strip in controversy, and for the reason that there is no evidence showing or tending to show that said defendant company had notice of the assignment or transfer of any interest of the said obligees in said bond to said plaintiff, or that the said plaintiff was the owner of any interest of the said Sterling and Huggins so purchased by the said defendant company, on account of which the evidence is insufficient to support the said finding.

nn. The court erred in making findings eleven and twelve, for the reason that under the laws of the United States the said plaintiff had no equities or rights as shown by the pleadings in this case and the evidence introduced upon its part to a specific performance of the contract sued on, and for the reason that the same is contrary to public policy and contrary and in violation of the statutes of the United States in reference to the acquisition of title by patent to mining claims, and for the reason that said agreement and allegations in said pleadings show collusion between said parties to said bond or agreement by which a title was to be conveyed to said property by the Government of the United States, contrary to the policy of said mineral land laws.
221 *oo.* The court erred in not finding upon the issue requested to be found by the said defendants, for the reason that the same present material issues under the pleadings and evidence in said cause.

pp. The court erred in its conclusions of law and in the rendition of a decree in favor of the plaintiff, for the reason that under the pleadings and evidence in said cause it is clearly averred and shown that the bond upon which this action was instituted is contrary and in violation of the laws of the United States with reference to the acquisition of titles to the mineral lands, in that it shows a collusion between the obligees and obligors therein, by which a patent to the land in controversy was to be acquired by the predecessors in interest of the defendant company in fraud of said law, which question defendants here present as a Federal question and desire to preserve.

The foregoing is the statement in pursuance of the notice heretofore given for a new trial in said cause.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN &
TOOLE & WALLACE,
Attorneys for Defendants.

It is hereby stipulated and agreed that the foregoing statement on motion for a new trial, when amended and allowed by the court, may be used by either party as a statement on appeal.

——— ———,
——— ———,
——— ———, *Attorneys for Plaintiff.*

222 W. W. DIXON,
McCONNELL, CLAYBERG & GUNN &
TOOLE & WALLACE,
Attorneys for Defendants.

Service of statement on motion for a new trial this day made by delivering to us a copy thereof in the above-entitled cause this 13th day of July, 1895.

——— ———,
——— ———,
——— ———,
Attorneys for Plaintiff.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

Harry H. Yaeger, being duly sworn, makes oath and says that he is clerk in the office of Toole & Wallace, in the city of Helena, county of Lewis and Clarke and State of Montana; that he served the foregoing statement on motion for a new trial by delivering to Wm. E. Cullen, of the law firm of Cullen & Toole, a copy thereof, at their office, in the said city of Helena, on this 13th day of July, 1895.

HARRY H. YAEGER.

Subscribed and sworn to before me this 13 day of July, 1895.

[Seal of District Court.]

H. J. CASEDY,
Deputy Clerk.

The foregoing statement on motion for a new trial is hereby settled and allowed this 13th day of July, 1896.

HORACE R. BUCK, *Judge.*

223 And on the 1st day of July, 1895, said defendants gave the following notice of appeal in said cause:

Title of Court.

Title of Cause.

To the above-named plaintiff, The Montana Mining Company (Limited), Cullen & Toole, M. Kirkpatrick, and Charles Hughes, its attorneys, and to John Bean, clerk of the district court of the first judicial district of the State of Montana in and for the county of Lewis and Clarke:

You will please take notice that the defendants in the above-entitled action hereby appeal from the judgment and decree therein

rendered on the first day of June, A. D. 1895, and from the whole thereof, to the supreme court of the State of Montana.

This 1st day of July, A. D. 1895.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Defendants.

Service of the foregoing notice by copy this day made, this 1st day of July, A. D. 1895.

M. KIRKPATRICK,
C. J. HUGHES, JR.,
CULLEN & TOOLE,
Attorneys for Plaintiff.
JOHN BEAN,
Clerk of said Court.
By JESSE C. RICKER, *Deputy.*

Duly filed.

224 And on the said first day of July, A. D. 1895, said defendants caused the following undertaking on appeal to be entered into and filed in said cause:

Title of Court.

Title of Cause.

Whereas the plaintiff in the above-entitled action, on the 1st day of June, A. D. 1895, recovered its judgment and decree against the defendant therein, wherein it was adjudged and decreed that the said defendants make, execute, and deliver a certain deed of conveyance in said decree mentioned; and

Whereas the said defendant company has executed the said deed and delivered the same to the clerk of said court, in pursuance of the statute in such case made and provided:

Now, therefore, we, the undersigned, Geo F. Cope and Geo. H. Hill, freeholders of the county of Lewis and Clarke and State of Montana, in consideration of the premises and of said appeal on the part of the appellants, do promise to the effect that the appellants will pay all damages and costs which may be awarded against it or them upon said appeal or a dismissal thereof, not exceeding the sum of three hundred dollars.

Signed and sealed and dated this 1st day of July, A. D. 1895.

GEO. F. COPE. [SEAL.]
GEO. H. HILL. [SEAL.]

Duly acknowledged.

225 And thereafter and on the 13th day of July, A. D. 1896, said defendants' motion for a new trial having been theretofore submitted, the court overruled the same in the following words:

Title of Court.

Title of Cause.

The defendants having submitted their motion for a new trial herein, comes now the plaintiff and objects to the court passing upon said motion for that the said defendants have heretofore, to wit, on the first day of July, 1895, appealed the said cause and the whole thereof to the supreme court of the State of Montana by the service and filing of a notice of appeal and the giving of a requisite undertaking thereon, whereby this court is ousted of jurisdiction to hear and determine said motion.

Said motion for a new trial and the foregoing objection to the entering of the — on the part of the plaintiff by reason of a want of jurisdiction on the part of the court to do so coming on for hearing, the court, after considering the same, ordered that the motion for a new trial be denied; to which ruling the defendant excepted; and the plaintiff also excepted to the court's entertaining the motion for a new trial.

HORACE R. BUCK, *Judge.*

226 And thereafter and on the 17th day of July, A. D. —, defendants caused the following notice of appeal to be served and filed in said cause:

Title of Court.

Title of Cause.

To the above-named plaintiff, The Montana Mining Company (Limited), Cullen & Toole and Charles Hughes, its attorneys, and to the clerk of the district court of the first judicial district of the State of Montana in and for the county of Lewis and Clarke:

You will please take notice—

That the defendants in the above-entitled action hereby appeal from the order of the court therein rendered and entered on the 13th day of July, A. D. 1896, overruling said defendants' application and motion for a new trial and from the whole thereof to the supreme court of the State of Montana.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Defendants.

Service of the foregoing notice and receipt of copy acknowledged this 16th day of July, A. D. 1896.

CULLEN & TOOLE,
Of Attorneys for Plaintiff.

JESS C. RICKER, *Clerk*,
By GEO. E. BAYHA, *D. C.*

Duly filed.

227 And thereafter and on the said 17th day of July, A. D. 1896, said defendants caused to be entered into and filed the following undertaking on appeal in said cause:

Title of Court.

Title of Cause.

Whereas the plaintiff in the above-entitled action, on the 1st day of June, 1895, recovered a judgment and decree against the defendants therein, wherein it was adjudged and decreed that the said defendant company make, execute, and deliver a certain deed of conveyance in said decree mentioned, and also recover judgment for its costs in that behalf expended, amounting to the sum of one hundred and fifty-five dollars and thirty cents; and

Whereas the said defendant company has executed said deed and delivered the same to the clerk of said court, in pursuance of the statute made and provided; and

Whereas the said defendants are desirous of staying all proceedings herein, as well as the judgment for costs so rendered as aforesaid, and have appealed to the supreme court of Montana:

Now, therefore, we, the undersigned, E. D. Edgerton and Geo. H. Hill, freeholders of the county of Lewis & Clarke, State of Montana, in consideration of the premises and of the said appeal, on the part of the appellants do promise to the effect that if the said judgment or order appealed from or any part thereof be

228 affirmed or the appeal dismissed the appellants will pay the amount directed to be paid by said judgment or order or the part of such amount as to which the said judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the said appellants upon said appeal, and if the appellants do not make such payment after the filing of the remittitur from the supreme court in the court from which the appeal is taken judgment may be entered, on motion of respondent, in its favor against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellants on the appeal in an amount not exceeding the sum of three hundred and ten dollars and sixty cents.

And whereas the said defendants and appellants are desirous of staying the delivery of the said deed and of effectuating the appeal in pursuance of the statute in such case made and provided; and

Whereas the said defendants duly made their motion and filed their statement on motion for a new trial in said cause; which said motion was by the court on the 13th day of July, 1896, overruled; and

Whereas the said defendants and appellants are desirous of appealing from said order:

Now, therefore, we, the said sureties, resident freeholders, as aforesaid, do promise to the effect that the said appellants will pay

229 all damages and costs which may be awarded against them on the appeal or the dismissal thereof, not exceeding the sum of three hundred dollars.

Witness our hands and seals this 16th day of July, 1896.

E. D. EDGERTON. [SEAL.]
GEO. H. HILL. [SEAL.]

Sureties duly qualify.
Duly filed.

230 *Clerk's Certificate.*

STATE OF MONTANA, } ss:
County of Lewis & Clarke, }

I, Jess C. Ricker, clerk of the district court of the first judicial district of the State of Montana in and for the county of Lewis & Clarke, do hereby certify that the foregoing transcript on appeal, containing 294 pages, exclusive of this and index, contain full, true, correct, and compared copies of all the files, pleadings, exhibits, papers, and evidence in narrative form as the same were given and used on the trial of said action and are of record and on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of the district court of the first judicial district of the State of Montana in and for the county of Lewis & Clarke this 31st day of August, A. D. 1896.

JESS C. RICKER, *Clerk.*
By GEO. E. BAYHA,
Deputy Clerk.

[SEAL.]

231 STATE OF MONTANA:

In the Supreme Court, December Term, 1897.

THE MONTANA MINING COMPANY (LIMITED), Plaintiff and Respondent,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF Montana and Charles Mayger, Defendants and Appellants. } No. 956.

Submitted October 27th, 1897; decided January 17th, 1898.

232 *Statement of the Case by the Justice Delivering the Opinion.*

This is an action for the specific performance of a contract.

The complaint alleges that on the 7th day of March, 1884, the plaintiff's predecessors in interest, namely, William Robinson, John Huggins, Frank P. Sterling, Warren De Camp, and John W. Eddy, were the owners of, in possession, and lawfully entitled to the use, occupation, and possession of a certain portion of the Nine Hour Lode mining claim particularly described in the complaint; that thereafter the defendant Charles Mayger applied to the U. S. land office at Helena for a patent to the St. Louis Lode mining claim, owned by said Mayger, and that in the survey he caused to be made of the said St. Louis Lode mining claim he included that part of the

Nine Hour Lode mining claim described in the complaint and which is the subject-matter of this litigation; that thereupon the predecessors in interest of plaintiff commenced an action in the district court of the third judicial district of the then Territory of Montana to determine the right to the possession of said premises, in which action the said Robinson and Huggins were plaintiffs and the said Mayger was the defendant; that while said suit was
233 so pending in said district court to determine the possession and right to the possession of the mining ground in dispute in this case, and on the 7th day of March, 1884, for the purpose of settling and compromising the said suit and for the purpose of settling and agreeing upon the boundary lines between the Nine Hour Lode mining claim and the St. Louis Lode mining claim, the defendant Charles Mayger made, executed, and delivered to the said Robinson, Huggins, and Sterling a certain bond for a deed, whereby, in consideration of the compromise and settlement of the said lawsuit and the withdrawal of the said protest and adverse claim and the dismissal of the suit, the said Mayger covenanted and agreed that when he should obtain a patent to the mining ground in dispute in that suit and in this he would make, execute, and deliver to the said Robinson, Huggins, and Sterling a good and sufficient deed for the same; that thereupon Robinson and Huggins dismissed their suit, withdrew their adverse claim, and performed all the conditions of the bond on their part; that the said Mayger then proceeded with his application and obtained a patent, but that he gave no notice to the plaintiff or any of its predecessors in interest of the obtaining of said patent from the Government until some time in November, 1889; that at the time of the execution of said bond for a deed plaintiff's predecessors in interest were in possession of the said premises, and that they and plaintiff have ever since been and yet are
234 in possession thereof, holding and using the same as a part of the Nine Hour lode; that by mesne conveyances the title to the said Nine Hour lode, including the portion thereof above particularly mentioned and in dispute in this suit, has been conveyed to the plaintiff, and that plaintiff is now the owner thereof, that it is entitled to a conveyance of the said premises from the said defendants in accordance with the bond executed by said Mayger to the predecessors in interest of the plaintiff; that said Mayger on or about the 10th day of June, 1893, pretended to convey the piece of ground in controversy to the defendant The St. Louis Mining and Milling Company, but that the said company had full knowledge and notice of the making, execution, and delivery of said bond for a deed by the said Mayger and of the rights and equities of the plaintiff thereunder; that the said St. Louis Mining Company has instituted a number of suits in the circuit court of the United States, in which it claims that it is the owner of the premises described in the complaint, and also claims the right to recover certain sums of money for ores alleged to have been unlawfully extracted from the premises in dispute; that the deed from said Mayger to the St. Louis Mining and Milling Company is a cloud upon plaintiff's title to the premises.

Plaintiff prayed for a decree of court that the defendants execute to it, the plaintiff, a good and sufficient deed to the premises in controversy.

235 The answer denies all the material allegations of the complaint, and affirmatively alleges that the adverse claim interposed, as stated above, by the predecessors in interest of plaintiff, to the application of Mayger for a patent, was for the purpose of harrassing and hindering the said Mayger in obtaining a patent to his mining claim, and that the bond was given contrary to equity, good conscience, and public policy.

The replication denies the new matter contained in the answer.

The case was tried to the court without a jury. The court made findings of fact, which are substantially as follows:

1. The predecessors in interest of plaintiff named in the complaint were at the time mentioned in the complaint the owners of, in possession and entitled to the possession of the Nine Hour Lode mining claim described in the complaint, and the strip of ground in dispute called the "Compromise ground" was at the time and thereafter continued to be a part of the said Nine Hour Lode mining claim.

2. That the bond mentioned in the complaint was executed and delivered by Charles F. Mayger to the parties therein named, by which the said Mayger bound himself to convey to them or their assigns the mining ground in dispute, when the said Mayger had obtained a patent therefor; that said bond was given as a compromise and settlement of the controversy as to the land now in dispute and then in litigation between the parties, as stated in the complaint, and that said bond was for the purpose of com-

236 promising a suit and fixing and determining the boundary line between the Nine Hour Lode mining claim and the St. Louis mining claim, as alleged in the complaint, and that said Mayger thereafter did obtain a patent to the premises in dispute.

3. That the plaintiffs in said adverse mining suit, upon the execution to them of said bond by said Mayger, dismissed their suit and performed all conditions of the contract on their part.

4. That at the time of the execution of said bond the predecessors of plaintiff were in the actual possession of the mining ground in dispute, and that they and this plaintiff have ever since remained in the possession thereof, claiming and holding the same as a part of the Nine Hour Lode mining claim.

5. That at the date of the execution and delivery of the said bond it was expressly agreed between the parties thereto that all of the ground lying to the east of the westerly line of the Compromise strip should be a portion of the Nine Hour Lode mining claim.

6. That the plaintiff herein is the successor in interest of the said Robinson, Huggins, and Sterling, the obligees named in said bond, and is also the successor in interest of Warren De Camp and John W. Eddy, who were cotenants with the said obligees in said premises at the date of the execution of said bond.

7. That the mesne conveyances introduced in evidence on the

part of plaintiff embrace and were intended to include the
237 ground in dispute, and conveyed to the respective grantees therein named all of the interest, legal and equitable, which the grantor or grantors had in said premises at the date of the execution thereof, and that it was the intention of the parties to the deed to convey as well their interest *to* said ground in dispute as every other part and parcel of the said Nine Hour Lode mining claim.

8. That in July, 1893, the plaintiff, as the assignee of the said Robinson, Huggins, and Sterling, duly demanded a deed to the ground in dispute from the said defendants, but the said defendants refused to execute such deed, and that no demand was ever made from the said Charles F. Mayger by the plaintiff or any of its predecessors in interest prior to July, 1893.

9. That on the 10th day of June, 1893, the defendant Charles F. Mayger assumed to convey the said ground in dispute to his co-defendant, The St. Louis Mining and Milling Company of Montana, but that at the date of said conveyance the said St. Louis Mining and Milling Company had full notice and knowledge of the equities of the plaintiff in and to the said ground and its possession thereof.

10. That the defendants wrongfully assert title to the ground in controversy and thereby cloud the title and estate of the plaintiff therein, and that the plaintiff has a right to have such cloud removed from its title to the ground.

238 11. That the court finds all of the issues raised in this case in favor of plaintiff and against the defendants.

As conclusions of law the court found that the plaintiff is entitled to a conveyance from the said defendants for the premises described in said bond and in the complaint herein known as the "Compromise ground;" that the defendants and each of them should be enjoined and perpetually restrained from asserting any right, title, or interest of any kind or character in or to the ground in dispute, or any portion thereof, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

In accordance with said findings of fact and conclusions of law judgment was rendered for plaintiff, from which judgment and an order denying a new trial the defendants appeal.

239 *Opinion of the Court by Pemberton, C. J.*

There are several assignments of error directed to the action of the court in admitting in evidence the patent to the Nine Hour Lode claim and the mesne conveyances of the predecessors in interest of the plaintiff by which they conveyed their interests in said mining claim to the plaintiff.

These muniments of title are objected to because they do not specifically include, as appellant contends, the particular piece of ground in dispute. The patent and conveyances above mentioned all refer to the "Nine Hour Lode claim" as the description of the premises conveyed. Appellants contend that as the particular strip of ground in controversy is not included in the "Nine Hour Lode

Claim" patent, and not expressly included in any of the mesne conveyances above mentioned, but was included in the "St. Louis Lode Mining Claim" patent, it was error to admit them in evidence.

We think these muniments of title were admissible to prove title to the "Nine Hour Lode mining claim" in the plaintiff. Before the plaintiff could prove that it was entitled to a conveyance of the strip of ground in controversy, on the ground that it was in equity a part of the Nine Hour Lode claim, it was incumbent on
240 it to prove its ownership of said claim. The patent and mesne conveyances to the Nine Hour Lode claim were properly admitted for this purpose.

Counsel for the appellants urge that it was error on the part of the court to admit in evidence the bond for title to the ground in dispute, executed by defendant Mayger to the predecessors in interest of the plaintiff, for the reason that said bond is illegal, because against public policy. This appears to be the principal error assigned in the estimation of counsel for appellants, and seems to be the chief ground upon which counsel base their objections to the evidence admitted in the case, and upon which they insist that plaintiff is not entitled to recover in this case.

Let us examine this assignment, for upon its determination we think the case practically depends. It is not contended that the Nine Hour and St. Louis Lode mining claims were not valid mining claims. They both had valid discoveries and were located according to law. If so, the owners thereof had title—a grant to them from the Government (Belk *vs.* Meagher, 104 U. S., 279). It is conceded that Mayger had fully complied with the law and was entitled to a patent to the St. Louis Loce claim when he applied therefor. Then to all intents and purposes the parties to the bond at the time it was given were the owners of the mining ground embraced within the claims above named. If so, they could dispose of their title thereto in any way they pleased, unless they
241 were prohibited from so doing by some statute. What did the parties do? In order to settle a costly and troublesome lawsuit they entered into a compromise, by which they settled the title among themselves to the ground in dispute and fixed the boundary line between their two claims. We are at an utter loss to see how such a contract can be said to be against public policy or good morals. It seems to us to be just such a compromise of differences between the parties as is encouraged in equity. Our attention has not been called to any statute of the United States that prohibits such contracts, and unless there is some statutory prohibition we can conceive of no reason in law or equity why the contract in this case should be held to be illegal. (Gaines *vs.* Molen, 30 Fed., 37.)

The court found that the plaintiff was the owner of the Nine Hour Lode claim as well as the assignee of the bond of defendant Mayger for title to the ground in controversy, and that the defendant company took its deed to the same from defendant Mayger with full notice of the equities of the plaintiff; and we think the finding amply supported by the evidence. The evidence also amply

supports the finding of the lower court, that the predecessors in interest of the plaintiff were in actual possession of the ground in dispute at the date of the bond for title, and that the plaintiff and its predecessors have been in possession ever since that time.

242 We think there was no error in the action of the court in excluding or striking out the evidence of Mayger that the bond was executed to all the obligees therein named. The bond was in evidence and spoke for itself in that respect. The court properly found that the title of all the obligees named in the bond to the ground in dispute had been conveyed to the plaintiff.

The appellants assign as error the action of the court in admitting in evidence copies of certain conveyances. We think a sufficient foundation had been laid to authorize the admission of the copies by showing that the originals were not within the control or power of the plaintiff.

We think that the court properly found that the plaintiff was the owner in equity of the ground in controversy and was entitled to have the legal title conveyed to it by the defendants.

The judgment and order appealed from are affirmed.

Affirmed.

(Signed) W. Y. PEMBERTON,
Chief Justice.

I concur.

WM. H. HUNT,
Associate Justice.

Pigott, J., not sitting.

242½ In the Supreme Court, State of Montana.

MONTANA MINING COMPANY, LIMITED, Respondent,
vs.
CHARLES MAYGER ET AL., Appellants.

MONDAY, *January 17th*, 1898.

This cause came on this day for judgment and decision of the court on appeal. Whereupon, on consideration, it is now here ordered and adjudged that the judgment of the court below, made and entered on the 1st day of June, A. D. 1895, be, and the same is hereby, affirmed with costs.

Opinion by Pemberton, C. J.; Hunt, A. J., concurring; Pigott, A. J., not sitting.

243 In the Supreme Court of the State of Montana.

MONTANA MINING COMPANY (LIMITED), Defendant in Error,
vs.
ST. LOUIS MINING & MILLING COMPANY OF MONTANA and CHARLES Mayger, Plaintiff in Error.

Petition for Writ of Error.

To the Honorable W. Y. Pemberton, chief justice of the supreme court of the State of Montana:

Now come your petitioners, St. Louis Mining and Milling Company of Montana and Charles Mayger, by Toole, Bach & Toole, their attorneys, and respectfully represent that the action is not a personal action, but one relating to realty, and that in the above-entitled cause there was drawn in question the construction of the statutes of the United States, to wit, the construction of an act of the Congress of the United States approved May 10, 1872, and a provision or clause thereof, to wit, section 2325, chapter VI, Revised Statutes of the United States, and other sections of said chapter bearing upon the construction of said section, touching the validity of a
244 certain agreement upon which the rights and action of the *of the* plaintiffs in error is based, marked "Exhibit A" and made a part of the pleadings in said action, and upon the validity of which the title of said plaintiffs in error and defendant in error depends to the real estate in controversy; that said premises were and are claimed by defendants in error in said suit and proceedings under the United States patent therefor and the construction of said section and other sections of said chapter bearing thereon; that said question not only involved the validity of said agreement under said United States statutes, but the validity thereof under the doctrines of public policy, and that the same was in violation of the policy of the laws of the said United States and was void under a proper construction of said laws and the policy thereof, and that the decision of the said supreme court of the State of Montana was against the title and right of plaintiffs in error to said premises; and your petitioners further respectfully represent that in the records and proceedings, and also in the rendition of said judgment in the above-entitled cause, which is in the supreme court, before you, a manifest error hath happened in the matters and things in your petitioners' assignment of errors filed herewith more specifically set forth, to the great injury and damage of your petitioners.

Wherefore your petitioners pray that it may please your
245 honor to grant unto your petitioners a writ of error to remove the said cause and the record thereof into the Supreme Court of the United States, to the end that the error, if any hath happened, may be duly corrected and full*y* and speedy justice done your petitioners.

And your petitioners, as in duty bound, will ever pray.

ST. LOUIS MINING AND MILLING COMPANY OF MONTANA AND CHARLES MAYGER,
By TOOLE, BACH & TOOLE,
Attorneys for Plaintiffs in Error.

Let the writ of error issue as above prayed for, and a supersedeas in the said cause is hereby granted upon the petitioners filing with the clerk of this court a good and sufficient bond for said judgment appealed from, with costs in the sum of twenty-five hundred dollars, said bond to be approved by the clerk of said court.

W. Y. PEMBERTON,
Chief Justice of the Supreme Court of the State of Montana.

Service of foregoing petition and order and receipt of copy of same acknowledged this 26th day of February, A. D. 1898.

CULLEN, DAY & CULLEN,
Attorneys for Defendants in Error.

[Endorsed:] Petition for writ of error.

246 In the Supreme Court of the State of Montana.

MONTANA MINING COMPANY (LIMITED), Defendant in Error,
vs.
ST. LOUIS MINING & MILLING COMPANY OF MONTANA and Charles Mayger, Plaintiffs in Error.

Assignment of Errors.

Comes now the said St. Louis Mining and Milling Company of Montana and Charles Mayger, plaintiffs in error, by Toole, Bach & Toole, their attorneys, and say that the record and proceedings in the above-entitled cause show there is manifest error in this, to wit:

I.

The supreme court of the State of Montana erred in holding that the agreement upon which this action was and is based is not void under section 2325, chapter six, Revised Statutes of the United States, and other sections of said chapter relating thereto, and that said agreement was and is not void as opposed to the policy of said section and chapter, and that the same was and is not void as against public policy in the administration of the land laws
247 of the said United States.

II.

The said court erred in considering said agreement marked "Exhibit A" as being such an agreement as could or ought to be enforced in law or equity.

III.

The said court erred in admitting any testimony touching any of the matters, terms, or conditions in said agreement, for that the same was void because in violation of the said laws of the United States, contrary to the policy thereof, and against public policy.

IV.

That said court erred in admitting said agreement in evidence and in admitting in evidence any of the deeds of conveyance contained in the record, for the reason, first, that said agreement was void, and, second, because the conveyance to defendant in error did not comprise the thirty-foot strip of ground included in said agreement and in controversy herein.

V.

The said court erred in admitting testimony tending to change and vary the description and calls in said deeds, and especially in enlarging the description and calls in the deed to defendant in error so as to include the thirty-foot strip in controversy, notwithstanding the same was and is excluded from its said deed in plain and unequivocal terms.

248

VI.

The application, survey, and patent of the St. Louis Lode mining claim, as shown by the pleadings and evidence, include the thirty-foot strip in controversy, on account of which the court erred in admitting the patent of the Nine Hour Lode claim.

VII.

The court erred in admitting any of the deeds to defendant in error's predecessors in interest for the reasons above stated.

VIII.

The court erred in admitting the deed to Bratnober, and deed from Bratnober to Bayliss, and from Bayliss to the Montana Company (Limited), and from the Montana Company (Limited) to the defendant in error, for the reason that they only comprised the Nine Hour lode and did not comprise and portion of the thirty-foot strip in controversy included in the patent to the St. Louis Lode mining claim.

IX.

The court erred in admitting any evidence in said contract, "Exhibit A," as well as said patents and deeds, for that the said contract and transactions therein were contrary to public policy and the spirit and object of the acts of Congress relating to the mineral lands of the United States of America.

249 X.

The court erred in admitting any of the said pretended muniments of title, for that this action is barred by the laches of the defendant in error and its predecessors in interest, as well as by the statutes of limitation of the United States of America.

XI.

The court erred in rejecting the findings, each separately and severally, requested by plaintiffs in error and in making the findings it did make, and each and all thereof separately and severally, and in the conclusion of law set forth in the record.

Wherefore said plaintiffs in error pray that the said judgment of the said supreme court of the State of Montana be reversed, and that said court be directed to enter an order reversing the judgment entered herein.

TOOLE, BACH & TOOLE,
Attorneys for Plaintiffs in Error.

[Endorsed:] Assignment of errors.

250 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Montana, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Montana Mining Company, Limited, defendant in error, and St. Louis Mining and Milling Company of Montana and Charles Mayger, plaintiffs in error, wherein was drawn in question the validity of a statute or treaty of or an authority exercised under the United States and
251 the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under the said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or of a commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said St. Louis Mining and Milling Company of Montana and Charles Mayger, the plaintiffs in error, we, being being willing that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be given therein, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the

Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within sixty days from the date hereof, that, the record and proceedings aforesaid be- inspected, that said Supreme Court may cause further to be done therein to correct that error what of
252 right and according to the laws and customs of the United States shall be done.

Witness the Hon. Melville W. Fuller, Justice of the United States, this 26th day of Feb., in the year of our Lord one thousand eight hundred and ninety-eight.

Seal United States Circuit Court, District of Montana, 1890.

GEO. W. SPROULE, *Clerk.*

The above writ of error is hereby allowed by—
W. Y. PEMBERTON,
Chief Justice of the Supreme Court of the State of Montana.

Copy of foregoing writ of error served this 26th day of Feb'y, 1898.
CULLEN, DAY & CULLEN,
Att'ys for Def't in Error.

Due service of the above writ of error this 26th day of February, 1898, and a copy left with me at same time is hereby admitted.
BENJ. WEBSTER,
Clerk of the Supreme Court of the State of Montana.

252½ [Endorsed:] 956. Montana Mining Company, Limited, defendant in error, *vs.* St. Louis Mining & Milling Co. of Montana and Chas. Mayger, plaintiffs in error. Writ of error. Filed Feb. 26, 1898. Benj. Webster, clerk supreme court, State of Montana. Toole, Bach & Toole, attorneys for plaintiffs in error; offices, Bailey block, Helena.

253 UNITED STATES OF AMERICA, *ss:*

To Montana Mining Company (Limited), defendant in error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Montana, wherein Montana Mining Company (Limited) is defendant in error and St. Louis Mining and Milling Company of Montana and Charles Mayger are plaintiffs in error, to show cause, — any there be, why the judgment rendered against the said plaintiffs in error, as in said writ of error mentioned, should not be corrected and why
254 speedy justice should not be done to the parties in that behalf.

Witness the Honorable William Y. Pemberton, chief justice of the

supreme court of the State of Montana, this 26th day of Feb., in the year of our Lord one thousand eight hundred and ninety-eight.

W. Y. PEMBERTON,
Chief Justice of the Supreme Court of the State of Montana.

Signed and allowed by the chief justice this 26th day of February, A. D. 1898.

[Seal Supreme Court, State of Montana.]

BENJAMIN WEBSTER,
Clerk of the Supreme Court of the State of Montana.

Due and lawful service of a copy of the foregoing citation and of the writ of error mentioned therein accepted and acknowledged, at Lewis and Clarke county, State of Montana, this 26th day of February, A. D. 1898.

CULLEN, DAY & CULLEN,
Attorneys and Solicitors for Defendant in Error.

254½ [Endorsed:] 956. Montana Mining Company, Limited, defendant in error, *vs.* St. Louis Mining and Milling Company of Montana and Chas. Mayger, plaintiffs in error. Citation. Filed Feb. 26, 1898. Benj. Webster, clerk supreme court, State of Montana. Toole, Bach & Toole, attorneys for plaintiffs in error, offices, Bailey block, Helena.

255 In the Supreme Court of the State of Montana.

MONTANA MINING COMPANY (LIMITED), Defendant in Error.
vs.
ST. LOUIS MINING AND MILLING COMPANY OF MONTANA and Charles Mayger, Plaintiffs in Error.

Know all men by these presents that we, St. Louis Mining and Milling Company of Montana and Charles Mayger, as principals, and Henry Elling and George L. Ramsey, as sureties, are held and firmly bound unto the defendant in error, Montana Mining Company (Limited), in the sum of two thousand five hundred ($2,500.00) dollars; for the payment of which, well and truly to be made, we bind ourselves and each of our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 23rd day of February, A. D. 1898.

Whereas the above-named St. Louis Mining and Milling Company of Montana and Charles Mayger have obtained a writ of error and citation directed to said Montana Mining Company (Limited), citing and admonishing it to be present and appear within sixty days after the service of writ of error, and to
256 show cause, if any there be, whether judgment rendered in the above-entitled action by the supreme court of the State of Montana on the 17th day of January, 1898, should not be reversed:

Now, therefore, the condition of this obligation is such that if the said St. Louis Mining and Milling Company of Montana and Charles Mayger shall prosecute said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then this obligation to be null and void; otherwise to remain in full force and effect.

ST. LOUIS MINING AND MILLING CO. OF MONTANA,
By WILLIAM MAYGER, *Mgr.* [SEAL.]
CHARLES MAYGER.
By WILLIAM MAYGER,
His Attorneys-in-fact. [SEAL.]
HENRY ELLING.
GEORGE L. RAMSEY.

Signed, sealed, and delivered in the presence of—
JOSEPH W. CHIVERS.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

Henry Elling and George L. Ramsey, whose names are subscribed as sureties to the above undertaking, being severally duly sworn, each for himself says that he is worth the sum in the said undertaking specified as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

HENRY ELLING.
GEORGE L. RAMSEY.

257 Subscribed and sworn to before me this twenty-third day of February, 1898.

JOSEPH W. CHIVERS,
[SEAL.] *Notary Public in and for Lewis and Clarke County, State of Montana.*

Approved this twenty-sixth day of February, 1898.
W. Y. PEMBERTON,
Chief Justice of the Supreme Court of the State of Montana.

Attested as to approval by—
[SEAL.] BENJAMIN WEBSTER,
Clerk of the Supreme Court of the State of Montana.

258 STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

In the Supreme Court of the State of Montana.

I, Benjamin Webster, clerk of the said supreme court, do hereby certify and return to the honorable the United States Supreme Court that the foregoing volume, consisting of 259 pages, numbered

consecutively from 1 to 157, inclusive (including half pages 84½ and 242½), is a true and correct and complete transcript of the records, process, pleadings, orders, and judgment in said cause, and of the whole thereof, as appear- from the original records and files of said court; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation and writ of error, together with proof of service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Helena, Montana, this 16th day of May, A. D. 1898.

[Seal Supreme Court, State of Montana.]

BENJAMIN WEBSTER, *Clerk.*

Endorsed on cover: Case No. 16,889. Montana supreme court. Term No., 305. The St. Louis Mining and Milling Company of Montana and Charles Mayger, plaintiffs in error, *vs.* The Montana Mining Company, Limited. Filed May 23, 1898.

No. 305.

305

FILED
OCT 3 1898
JAMES H. McKENNEY
CLERK

In the Supreme Court

Brf. of Dixon & Toole for P. E. C.

OF THE

United States.

Filed Oct. 3, 1898.

OCTOBER TERM, 1898.

CHARLES MAYGER and the ST. LOUIS MINING & MILLING COMPANY OF MONTANA,

Plaintiffs in Error,

vs.

THE MONTANA MINING COMPANY, LIMITED,

Defendant in Error.

On Motion to Dismiss.

In Error to the Supreme Court of the State of Montana.

ARGUMENT AND AUTHORITIES OF PLAINTIFFS IN ERROR IN REPLY TO BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS.

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN,
THOMAS C. BACH, and
EDWIN W. TOOLE,

Attorneys for Plaintiff in Error.

H. S. Thurber & Co., Printers, Helena, Mont.

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1898.

CHARLES MAYGER and the ST. LOUIS MINING & MILLING COMPANY OF MONTANA,

Plaintiffs in Error,

vs.

THE MONTANA MINING COMPANY, LIMITED,

Defendant in Error.

On Motion to Dismiss.

In Error to the Supreme Court of the State of Montana.

ARGUMENT AND AUTHORITIES OF PLAINTIFFS IN ERROR IN REPLY TO BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS.

Taking the statement of defendants in error, as to the pleadings to be correct, the statement of facts seems to be incomplete in this: The denial that defendant company ever succeeded to any interest of the locators of the Nine Hour

Lode claim, if they ever had any, of course required some *legitimate* evidence that it did acquire such interest. The question is what interest, if any, did the *Montana Mining Company* (*limited*) acquire under the deed from Bayliss to the Montana Company, and by the deed from the Montana Company to it, as no other title is asserted or could be maintained under our Statute of Frauds without being pleaded. Objection and exceptions to the admission of these deeds was duly made and saved. These deeds will be found on pages 73 original, 34 print; 74 original, 35 print.

The pleadings admit and the case was tried upon the theory that the "thirty foot strip" was excepted out of the Nine Hour patent, and included in the St. Louis patent. Hence the title of the Montana Mining Company (limited) under its deed became a material matter, and the question as to the right to enlarge the grant according to the calls in the deed a controlling one. We mention this in connection with the claim that the appeal is taken for delay. As we understand it, if this court takes jurisdiction on account of a Federal question being involved, it will consider all errors properly assigned, which are decided upon common law principles and not controlled by interpretations given the local statutes.

Is there a Federal question involved?

The many arrogant expressions and violent assumptions made by counsel for defendant in error in their brief will be passed without further notice.

It never was claimed, and is not claimed, that there is any *express* prohibition against the transaction involved in the

agreement and presented in the record. The question is one involving the construction of the law applicable to the entry and *patenting* of a quartz lode mining claim, and the *point is* whether the agreement and transaction is one contrary to the *policy* of that law, and if it is, this court on account of its Federal jurisdiction, must finally determine it. Hence we claim that none of the decisions cited by counsel for defendants in error have any direct bearing upon the main question involved.

When an agreement is contrary to *express* law, especially in cases where congress alone under the constitution can make primary disposition of the public domain, and has done so, the mode is a condition precedent, and any other is against the public policy of its laws. This is axiomatic, as nothing else can be effectual to divest the title.

And so it is; the real question presented is whether a different mode of disposing of the title involves a Federal question. The pursuance of the *bare* form when the facts pleaded and proofs introduced show that it has no real foundation does not satisfy the law so as to warrant a court of equity in enforcing a contract,which in terms dispenses with the *conditions* and *objects* of the mode provided. The contract, as pleaded and proven, is contrary to the policy of the law.

Kennet vs. Earle, 27 Pac., 735, is in point. The provisions of the Statutes of the United States bearing upon this question are found in the following sections. All plaintiff in error was entitled to a patent for, was what it or its predecessor had lawfully located, and by the agreement it was to acquire more:

Section 2319, R. S. U. S., expressly provides that titles shall be acquired "under regulations prescribed by law."

And *right of possession* depends upon compliance with the laws. (Sec. 2322.)

The location must be distinctly marked upon the ground so that its boundaries can be readily traced. (Sec. 2324.)

Must have been properly located to obtain a patent. (Sec. 2325.)

If no adverse claim is filed, it shall be assumed that none exists. (Sec. 2325.) Here one was filed, and the contract sought to be enforced was made the basis of its withdrawal. The party adversing was required to bring suit and to prosecute it to final determination, to try his right of possession, and his failure to do so is a *waiver* of his adverse claim. Here he proposes not to waive it, but enforce it by agreeing that one may acquire a patent which he shows was not under the law entitled to it. (Sec. 2326.)

Only party entitled to possession shall have a patent. Here it is shown that under pleadings, proof and finding, the party to procure the patent under the contract was never in or entitled to possession. (Id. 2326.)

If neither had a valid location the court should have so found. (Supplement R. S. U. S., p. 324.) Here the court by the contract was prevented from investigating this matter, and one is conceded to have secured a patent under the contract who was not entitled to it.

The contract of the predecessor in interest of defendants

in error, as shown by the contract, pleadings and findings, contemplated perjury on the part of the plaintiffs in error, according to the theory of defendants in error.

Anderson vs. Carkins, 135 U. S., bottom p. 489, top 450.

Upon the proposition that the contract relied upon and the facts pleaded are contrary to the policy of the mining laws referred to, we cite the following decisions and authorities:

Hannay vs. Eve, 3 Cranch, 242.
Dial vs. Hair, 54 Am. Dec., 176.
Drexler vs. Tyrrell, 15 Nev., 114.
Smith vs. Applegate, 25 N. J. L., 352.
Sharp vs. Tees, 4 Hals., 352.
Pratt vs. Adams, 7 Paige, 615.
Tatum vs. Kelly, 25 Ark., 209.
De Groot vs. Van Duzer, 20 Wend., 390.
Mitchell vs. Cline, 84 Cal., 409.
1 Pom. Eq. Jurisp., Sec. 40.
Miller vs. Ammon, 145 U. S., 421.
Grey vs. Reynolds, 21 N. Y., 771.
Swanger vs. Mayberry, 59 Cal., 91.
Ladda vs. Hawley, 57 Cal., 51.
Mitchell vs. Smith, 2 Am. Dec., 417.
Boyd vs. Barclay, 34 Am. Dec., 762.
Bank of Michigan vs. Niles, 41 Am. Dec., 575.
Bell vs. Leggett, 7 N. Y., 176.
Kennel vs. Chandler, 14 Hun., 39.

Connolly vs. Cunningham, cited in Greenhood on Public Policy, 446.

George vs. Proctor, 66 Led., 240.

There are also various other authorities bearing upon the same propositions to which we refer the court:

Damrell vs. Meyer, 40 Cal., 166.
Hudson vs. Johnson, 45 Cal., 21.
Auston vs. Walker, 47 Cal., 484.
Bull vs. Shaw, 58 Cal., 455.
McGregor vs. Donelly, 67 Cal., 149.
Spence vs. Harvey, 22 Cal., 337.
County Lodge vs. Gray, 98 Ind., 288.
U. S. vs. Trinidad, 137 U. S., 160.
Kreamer vs. Earl, 91 Cal., 112.

As the constitution confers upon congress *alone* the *power* to make primary disposition of the public domain, and it has assumed to do so and prescribed the *mode* of its exercise, the mode becomes a part of the power. In other words, both the right and remedy are conferred, and in such case the remedy is exclusive.

By *express law* it has prescribed the mode of *acquiring* and *preserving* a possessory right to a quartz lode mining claim, and no other mode can be employed. It has in equally emphatic terms provided the mode by which this possessory right may be merged into a title in fee by the execution of a United States patent. Having the *jus disponendi* of the *fee*, and having prescribed the mode by which it is to be divested

of that character of title, it is exclusive of all others. Congress in such case is the sole judge as to the necessity of the law it enacts, and many good reasons might be assigned for closing the doors for possible frauds, as it has done.

If there had been a sale or transfer by compromise or in any other proper mode by which the possessory title, shown clearly by the pleadings of defendant in error, to be in their predecessor, then the law recognizes such sale and transfer and authorizes the issuance of the patent to the grantee. But this is not the case here, the transaction is incomplete, and the authorities cited by solicitors for defendent in error are consequently inapplicable.

The inherent infirmity of the contract is the question to be determined. Defendant in error is seeking to enforce its specific performance, when it shows that the grantor in the patent never had the possessory right to the mining claim, and no right under the express, *i. e.*, exclusive provisions of the law to a patent. It is the vicious provisions of the agreement, therefore, that one in no way entitled to a patent shall get it and convey it to another, by withdrawing the adverse claim, and then asking a court of equity to consummate the scheme by a specific performance of the contract, that was complained of. Congress evidently had good reason for prescribing the *particular* mode by which the government was to be divested of the fee to a quartz lode mining claim, and in prescribing the *conditions precedent* upon which a patent should issue, and thereby shut out any other made by the agreement or collusion of any one. If then, under the showing made by defendant in error, by the allegations in the

pleadings and proof and the findings as shown by the record, the agreement is contrary to express legislation of congress, it is against the policy of the law, and a court of equity will not aid in enforcing it. If this position is maintainable, or deserves a further hearing than a motion of this kind affords, we respectfully submit that on account of the manifest errors as shown by the record, it should be overruled, there being no statute of the state controlling the questions ruled upon, and consequently no binding decision of its Supreme Court.

Teal vs. Walker, 111 U. S., 242

The same doctrine of construction announced the interpretation of an express statute of a state by its highest judicial tribunal, and respected by this court in Teal vs. Walker, *supra*, upon questions of the policy of its laws, would make the proposition here presented in the interpretation of the laws of the United States in reference to the policy thereof, a Federal question. The question is not whether the transaction was expressly prohibited, but whether it is contrary to the policy of the law as expressed.

Whilst the law favors a compromise of litigation and makes it a valid consideration for an agreement, yet, if the terms of the compromise should be contrary to the policy of the law, another principle entirely would be involved; and the question as to whether or not the agreement was contrary to such policy would be a matter of more importance in determining the rights of the parties under it than the question of compromise. The policy of the mineral land law is to allow a patent

where there is a valid location. The same policy imposes a duty upon an adverse claimant, after application for a patent, to litigate his adverse claim, when he claims any right under it. It is the means of preserving and protecting this policy. He may abandon his adverse claim, and thereby concede to his adversary the necessary compliance with the law so as to enable him to obtain his patent. But, in the absence of this concession, when he combines with him so as enable him to obtain a patent, when he could not otherwise have obtained it, as is shown by the complaint, and, under such circumstances, retains by contract a benefit or interest in the patented lands thus acquired, his contract is contrary to the policy of the law, and therefore incapable of being specifically enforced in a court of equity. It would seem that under the sections of the statute of the United States with reference to the interposition of adverse claims, where he proposes to retain an interest in or benefit from the property sought to be patented, it is his duty to litigate his rights. That it is the policy of the land laws that these rights shall be litigated or abandoned is made still more manifest by the statute that requires the court to reject the claim of both when neither has complied with the law, and thereby defeat the issuance of a patent to either. If it is apparent by the combination between the parties that this result would be avoided, and that one of the parties would obtain the patent to the land, to which he is not entitled, it is certainly contrary to the policy of the law. Here the adverse claimant has not litigated his claim and shown his right to a patent, nor has he defeated the application, but still retains his claim and combines with

the applicant in getting a patent, when he knows such applicant was not entitled to it, and in this way the operation of the statute as intended is defeated and a patent granted to one where it either should have been granted to the other or to neither party. This transaction destroys the mode of ascertaining by the judgment of the court whether either party is entitled to a patent, and permits a combination by which a decree of court is obtained, which decree is itself made conclusive upon the Land Department in issuing the patent. If he abandons his right, the application is, in a proper sense, thenceforward ex parte, and the government alone could defeat the legal title acquired by the patent. When the combination exists and the adverse claimant is still the beneficiary, it is not ex parte in a proper sense, but the applicant is seeking to obtain a title he concedes he is not entitled to, and the adverse claimant is claiming a right under the patent, not according to the policy of the law, and through one whom he also asserts has no title to it. Such a combination, therefore, would seem to result in obtaining a patent contrary to the policy of the statute, and a contract by which either the one or the other is to reap a benefit, derived from such a combination, ought not to be specifically enforced in equity. An offensive combination to accomplish this constitutes the gravamen of the question as being against public policy rather than the injuries that may or may not result from it. Indeed, the court will look into the contract no further than is necessary to see whether it contravenes public policy of the statute, and if it does, deny the relief sought. A combination of the parties by which one is to secure a patent, who, under the policy of

the law is not entitled to it, is no more to be tolerated than the connivance between a husband and wife for the purposes of a divorce. Where the combination in the one case and the connivance in the other is shown, the action must fall. Respondent can not combine in this way with the applicant and assist in securing to him a patent, which depends upon a valid location, and afterwards be heard to assert that the location is invalid, which he in substance must do here. By withdrawing his adverse claim he assured the government that he had no valid claim, and enabled his adversary to obtain a title upon the faith of a valid location, which carried with it possession and the right of possession, and he cannot gainsay either. Nor can he avail himself of the benefits of a contract which would allow him such a privilege. The object of his action now is to regain the possession, or show to the court that the applicant never was in possession, which he could only do by litigating his adverse claim. The applicant could not obtain a patent while he was in possession, which followed a valid location which is alleged to have been in the Nine Hour claimants, and he cannot relinquish such possession to enable the applicant to do so, and after it is done come into court and say, "I have always been in possession," which he is now trying to. Respondent pleads the facts which, in law, estops it, and on the motion of the court, or suggestion of any one, it is called upon to uphold the law which defeats one who has followed it in the showing sought here to be made. The possession and right of possession of the applicants for a patent to the St. Louis Lode Claim was essential and necessary to obtain a patent for it. Respond-

ent's predecessors in interest come into court now and claim the invalidity of the location and possession of the applicant for the St. Louis patent, to avoid the operation of the statutes of limitation. They must then have, therefore, assured the possession of the predecessors in interest of the applicants for the patent, which is the essential element to obtain the patent. If they claim that they were in possession as locators entitled to possession, and have lawfully been in possession since the location of the thirty-foot strip, they cannot then assert that by reason of the combination or agreement with the applicants to the patent, the government was deceived and induced to grant a patent contrary to the laws by which they were issued, because, in such case, public policy will not permit them to avail themselves of such an agreement. And so it is; by the allegations of the complaint it is shown that their possession and right of possession during all the proceedings in obtaining a patent was to avoid the result of the statutes of limitation, and they have thereby entailed upon themselves an equally fatal result in aiding in the consummation of a scheme contrary to the policy of the statute, and equity will not allow them to enforce the scheme and receive the contemplated benefits from it.

As suggested, the compromise of a lawsuit ordinarily affords a consideration to uphold it, as the policy of the law abhors litigation. But when the purpose and result of the compromise is to defeat the policy of the law,—we may say even the plain provisions of the law,—the consideration is tainted, and its enforcement will be discouraged rather than justified in a court of equity. So that the main question raised

in the motion for a non-suit involved in this proposition is whether or not the contract is void as against the policy of the law.

It is manifest from the allegations contained in the complaint, and from "Exhibit A," which is made a part of it, as well as from all the testimony touching upon those propositions, in so far as the showing of defendants in error is concerned, that their alleged predecessors in interest in obtaining a patent to the thirty-foot strip, to which they were not entitled, and which they could never have obtained except by the agreement set forth, were for this reason, among others, we insist, transactions contrary to the policy of the law, and ought not to be enforced.

Whatever may be the presumption in a court of laws, as to the compliance of the grantee with the requirements of the law, in this suit in equity it is shown by defendant in error that no such compliance was had, and that the law was circumvented by means of the very agreement it is seeking to have specifically enforced. Under such conditions, we respectfully submit that the transaction is contrary to the object and policy of the Mineral Land Law of the United States, that a Federal question is presented, and that *the scheme* should not be consummated by specific enforcement.

Was the writ sued out for delay? If there is any merit in the Federal question presented, it is conclusive against the right of defendant in error, under the showing it makes, to a specific performance, which is inconsistent with any theory that the object was delay.

Attorneys for defendants in error, in their argument, p. 14, make the violent assumption that because plaintiffs in error availed themselves of all the time allowed by the state statute to prepare their statement on motion for a new trial, and bring it to a hearing, that this court will entertain this fact as evidence of an intention to delay. The very object of statute in fixing a period within which these things were to be done was to obviate all objection on account of laches and to place the party in that respect upon the same footing as if the acts had been done at the earliest possible moment. If there was any inexcusable delay, in this, as claimed, it should have been urged in the trial court, and not here.

Section 1174, Code of Civil Procedure of the State of Montana, provides: "The application for a new trial shall be heard at the earliest practicable period, * * * and may be brought to a hearing upon motion of either party."

Any of these matters could have been called up in the trial court, by either party, and if not done it will be assumed in the absence of a showing to the contrary, that good reason existed for not doing so.

Aside from the question heretofore discussed, a reference to one fatal error, besides others disclosed by the record, will suffice, we think to satisfy the court that the appeal is not frivolous.

The complaint and "Exhibit A," made part of it, shows that the thirty-foot strip involved in this contention was included in the survey, application for patent, and patent issued for the St. Louis Quartz Mining Claim, and that the same was

lopped off of the adverse claim and not included in the patent to the Nine Hour Quartz Mining Claim. That there was error, therefore, in admitting the patent to the Nine Hour claim, as a muniment of title in this action, would seem too manifest to require argument or the citation of authorities.

The *injury* occasioned by this error, which was the entering wedge to the admission of the mesne conveyance to the defendant in error, will become apparent when the calls of the deeds constituting the mesne conveyance are carefully examined. The deeds preceding the one to Bratnober refer in general terms to the Nine Hour Lode claim. But *in so far* as defendant in error's claim under the *deeds* is concerned, it is only necessary to see what has been conveyed to it. Bratnober's deed to Bayliss was for the "Nine Hour Lode, the *same being* Lot No. 63, Township 11, North of Range 6 West, according to the United States Government survey thereof," as will be seen by reference to the record, page 34. The deed from Bayliss to the Montana Company (Limited) calls for "that certain other quartz lode mining claim called the Nine Hour Lode Claim, the same being designated in the United States patent therefor as lot No. 34. In the conveyance from the Montana Company (Limited) to respondent the same description is employed, all conforming to the description contained in the patent. (See record, p. 34.) That these conveyances were considered by the learned judge who tried the case, will clearly appear from finding 8, record, page 93. This finding forms one upon which the decree was entered, and this court, according to all precedent, if the evidence was incompetent, will not assume to say what would have been the result had

the objection to its admission been sustained. The question, then, is fairly presented, whether, under the calls in these deeds and patent of the Nine Hour Lode, they could by oral evidence include the thirty-foot strip in question, embraced in the patent to the St. Louis Lode, so as to make them competent evidence on the trial of this case. That the objection to this testimony should have been sustained, we cite the court to the following authorities:

Taylor vs. Holter, 1 Montana, 685.
3 Washburn, R. P., 4 Ed., 404 and 424.
Alabama vs. Montague, 117 U., S., 611.
Patentee vs. N. P. R. R. Co., 134 U. S., 163.
Waldin vs. Smith, 39 N. W., 82.
Thayer vs. Finton, 15 N. E., 615.
Mendel vs. Whiting, 31 N. E., 431.
Thaxter vs. Turner, 24 Atl., 829.
Young vs. Cosgrove et al., 49 N. W., 1040.
Muldoon vs. Deline, 135 N. Y., 150.

These authorities are also conclusive as to the inadmissibility of all the testimony tending to show an intention to include the thirty-foot strip in said deeds, to which we have heretofore referred.

For this manifest error of the court, we insist this case should be reversed. They are also conclusive against all the other deeds conveying the Nine Hour Lode claim.

Carson City, &c., vs. North Star, &c., 73 F., 599.

But, as we have before suggested, if it was true that all

the deeds of conveyance to the predecessors of Bratnober included the thirty-foot strip in the designation Nine Hour Lode Claim, yet the deeds from Bratnober to Bayliss and Bayliss to the Montana Company Limited, and the latter to respondent, and the deeds to respondent are limited to the Nine Hour *as described* in the Nine Hour patent, which does not include the thirty-foot strip, and which cannot be made by proof *aliende* to do so, it logically follows that all these deeds, mortgages, etc., were likewise incompetent. Suppose all the conveyances to Bratnober included the thirty-foot strip, and Bratnober, as we have seen, never conveyed it, and in a suit by a successor in interest (having, perhaps, an action to reform the deeds), are not all these deeds incompetent in respect to the question of title to the thirty-foot strip? The answer, we claim, must be in the affirmative.

Respectfully submitted,

W. W. DIXON,
McCONNELL, CLAYBERG & GUNN,
THOMAS C. BACH, and
EDWIN W. TOOLE,

Attorneys for Plaintiff in Error.

No. 305.

Brf. of Hughes & Cullen for D. & E.

... IN THE ...

SUPREME COURT

Filed Sept. 21, 1898.

OF THE

UNITED STATES.

OCTOBER TERM, 1898.

CHARLES MAYGER, and the ST. LOUIS MINING AND MILLING CO., OF MONTANA,

Plaintiffs in Error.

Versus

THE MONTANA MINING COMPANY, LIMITED.

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

Motion to Dismiss for Want of Jurisdiction, and Brief of Defendant in Error.

CHARLES J. HUGHES, Jr.,
and W. E. CULLEN,
Attorneys for Defendant in Error.

... IN THE ...

Supreme Court of the United States.

OCTOBER TERM, 1898.

CHARLES MAYGER and the ST. LOUIS MINING AND MILLING CO., of MONTANA
Plaintiffs in Error.

Vs

THE MONTANA MINING COMPANY, LIMITED,
Defendant in Error.

MOTION TO DISMISS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

Now comes the defendant in error, the Montana Mining Company, Limited, by its Counsel, and respectfully moves dismissal of the writ of error in above entitled cause, for want of jurisdiction in this honorable count.

1. Because no federal question is presented by the record, and
2. Beause the writ of error is taken for delay only.

And the defendant in error further moves the Court to affirm the judgment of the Supreme Court of Montana, although the record may show that this Court has jurisdiction, for the reason that the question on which the jurisdiction depends is so frivolous as not to need further argument.

CHARLES J. HUGHES, JR.
and W. E. CULLEN,
Attorneys for Defendant in Error, the Montana Mining Company, Limited.

... IN THE ...

Supreme Court of the United States,

OCTOBER TERM, 1898.

CHARLES MAYGER and the ST. LOUIS MINING AND MILLING CO. of MONTANA,
Plaintiffs in Error.

Vs.

THE MONTANA MINING COMPANY, LIMITED.
Defendant in Error.

NOTICE OF MOTION.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

To Messrs. Toole, Bach & Toole, Attorneys for Plaintiffs in Error:

Please take notice that on Monday, the tenth day of October, 1898, at the court room of the Supreme Court of the United States, in the City of Washington, at the opening of said Court at 12 o'clock of said day, or as soon thereafter as counsel can be heard, the Defendant in Error, The Montana Mining Company, Limited, will move said Court to dismiss the writ of error herein to the Supreme Court of the State of Montana upon the ground that said Court has no jurisdiction to hear said writ, and that no writ of error lies from the judgment or decree of said Supreme Court of the State of Montana.

Said motion will be heard on the printed transcript of said case, No. 305, on file in the Clerk's office of the said Supreme Court of the United States, and the attached brief.

CHARLES J. HUGHES, JR.
and W. E. CULLEN,
Attorneys for Defendant in Error, The Montana Mining Company, Limited.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

Charles Mayger, and the St. Louis Mining and Milling Company, of Montana,

Plaintiffs in Error.

Versus

The Montana Mining Company, Limited,

Defendant in Error.

BRIEF ON MOTION TO DISMISS.

This cause comes up on a motion made by the defendant in error to dismiss the writ of error sued out in this case for want of jurisdiction, and, united with it, is a motion to affirm the judgment of the Supreme Court of Montana, from which the case comes, on the ground that it is manifest that the writ of error was sued out for delay only, and that the question upon which jurisdiction depends (if this court has any jurisdiction) is so frivolous as not to need further argument. Uniting these motions in this way is authorized by the 5th subdivision of Rule 6 of the rules of this court.

The merits of this motion will be readily understood by a brief synopsis of the pleadings and a terse statement of the case, as developed on the trial in the court below, and shown in the transcript of the record of this court.

PLEADINGS.

The complaint in this case, after alleging the corporate existence of the plaintiff and the defendant company, alleges (Rec., p. 2)

that on the 7th day of March, A. D. 1884, the defendant in error's predecessors in interest, to-wit: William Robinson, John Higgins, Frank P. Sterling, Warren DeCamp and John W. Eddy, were the owners of, in possession and lawfully entitled to the use, occupation and possession of a certain portion of the Nine Hour Lode Mining Claim, embracing in all an area of 12,844.5 feet, together with all the minerals therein contained. That theretofore, on causing to be surveyed for patent his St. Louis Lode Mining Claim, the plaintiff in error, Charles Mayger, wrongfully extended and caused to be extended the easterly boundary line of the said mining claim over the premises above mentioned and particularly described in the complaint, and thereupon the said Mayger wrongfully made application in the United States Land Office at Helena, Montana, to enter said premises as a part of the St. Louis Lode Mining Claim; that thereupon the said predecessors in interest of defendant in error commenced an action in the District Court of the Third Judicial District of the Territory of Montana, to determine the right to the possession of the said premises, in which action the said Robinson and Huggins were plaintiffs and the said Mayger was defendant, that thereupon, and on the 7th day of March, A. D. 1884, to settle and compromise the said suit, and for the purpose of settling and agreeing upon the boundary lines between the Nine Hour Lode and the St. Louis Lode Mining Claim, the defendant, Chas. Mayger made, executed and delivered to the said Robinson, Huggins and Sterling, a certain bond for a deed, whereby, in consideration of the compromise and settlement of said lawsuit and the withdrawal of said protest and adverse claim, he thereby covenanted and agreed that when he should obtain such patent and on demand he would make, execute and deliver to the said Robinson, Huggins and Sterling, or their assigns, a good and sufficient deed for all of the premises in said complaint mentioned; that thereupon Robinson, Huggins and Sterling dismissed their suit, withdrew their adverse claim and performed all of the conditions on their part; that Mayger thereupon proceeded with his application and obtained a patent, but that he gave no notice of it to the plaintiff or any of its predecessors in interest, until on or about the ..... day of November, 1889; that upon the execution of said bond for a deed plaintiff's predecessors in interest were in possession of the said premises, and that they have ever since been and are yet in possession thereof, holding and using the same as a part of the Nine Hour lode; that by mesne conveyance the title to said Nine Hour Lode including the portion thereof above particularly mentioned and described, has come to the plaintiff, and it is now the owner thereof; that it is entitled to a conveyance of the said premises from the said defendant; that the

said Mayger, on or about the 10th of June, 1893, assumed to convey the said piece of ground to the defendant the St. Louis Mining & Milling Company, but that it had full knowledge and notice of the making, execution and delivery of the said bond for a deed by its co-defendant, and of the rights and equities of the defendant in error thereunder; that the St. Louis Mining & Milling Company has instituted a number of suits in the Circuit Court or the United States, in which it claims that it is the owner of the premises described in the complaint, and claiming the right to recover certain sums of money for ores alleged to have been wrongfully mined from said premises. The bond for a deed is appended to the complaint as an Exhibit and marked Exhibit "A." It is in the usual form and covenants that Mayger will proceed to procure as soon as possible a government patent and thereafter upon demand of the said William Robinson, James Huggins and Frank P. Sterling, or their heirs or assigns he agrees to make to the said William Robinson, his heirs or assigns, a good and sufficient deed for the premises mentioned in the complaint.

The answer (Rec., p. 7.) denies that the parties named were the predecessors in interest of the defendant in error, or that they were the owners or possessors of the tract of land in said complaint described, or that they were in possession or entitled to the possession of the same, and they aver that the same is and was a part of the St. Louis Lode Mining Claim, included in the United States patent obtained by the said Mayger for the said claim. They deny that the defendant wrongfully extended or caused to be extended the easterly boundary line of the said St. Louis Mining Claim over the said premises described; but aver that the same was a part of the St. Louis Lode Claim, and that the said Mayger and his successors in interest have been and are now in possession of the same, except a small portion occupied by an ore house of the plaintiff's by sufferance of the defendants. They admit that Mayger made application in the United States Land Office to enter the premises and that the said Robinson and Huggins interposed an adverse claim and instituted an action, and that the agreement set up was entered into between the parties, but deny that it was for the purpose of settling the boundary line between the Nine Hour Lode and the St. Louis Lode, but say it was simply a compromise on account of their adverse claim and suit. They admit that Mayger agreed after obtaining patent, on demand, to make to the said Robinson, Huggins and Sterling, their heirs and assigns, a good and sufficient deed for the premises, but they aver that the plaintiff never has acquired or succeeded to the right, title or interest of the said Robinson, Huggins and Sterling to the said premises. Admits that Mayger

obtained patent, and avers that the plaintiff's predecessor in interest had full knowledge and notice of the issue of the patent. They deny that at the time of the execution of the bond, or at any other time, the plaintiff or its predecessors in interest were or ever have been in possession of said premises, or that they ever used or enjoyed the same, or any part thereof, except the small part aforesaid, or that they ever had, held or enjoyed any part thereof as a part of the said Nine Hour Lode Mining Claim. They admit that plaintiff by mesne conveyance acquired the title to the said Nine Hour Lode Mining Claim, but deny that the said conveyance, or any conveyance of the plaintiff's embraced or included the premises in said complaint mentioned and described, or any part or portion thereof. They admit the demand that was made for a deed, but deny that no demand therefor had ever theretofore been made. Deny that they had any knowledge or notice that defendant in error, was the successor in interest of the said Robinson, Huggins and Sterling at the time of making said deed of the said defendant Mayger, to his said co-defendant. And the defendants affirmatively allege that the adverse claim aforesaid was interposed for the purpose of harrassing said Mayger, and hindering him from obtaining a patent of the St. Louis Lode Mining Claim, and that the said bond was executed as a compromise to avoid the same, all of which was done contrary to equity and good conscience; that on the 22nd day of June, 1887, the said Mayger obtained a United States patent for the premises described in the complaint, as a part and portion of the said St. Louis Lode Mining Claim; that the said St. Louis Mining and Milling Company, learning that the conveyance to it did not comprise the premises described in plaintiff's complaint, for the purpose of better securing its possessory title by it had and held, obtained and received the deed from Mayger mentioned in the complaint. It is then alleged that the cause of action set forth in the plaintiff's complaint is barred by the provisions of Sections 20, 30, 31 and 32, of the Code of Civil Procedure, as found in the Compiled Statutes of the State of Montana.

The replication (Rec., p. 10) specifically denies all new matter presented in the answer.

FACTS.

The facts, as shown by the testimony ,may be briefly stated as follows:

The Nine Hour Lode Mining Claim was located on or about the 26th day of July, 1880, by William Robinson, who was then a competent locator, and he made a good and sufficient discovery and location of the claim, neither of which was questioned at the trial, nor was any question raised as to the sufficiency of the recorded

location notices. At the time this location was made the St. Louis Lode Mining Claim had already been located. It lay to the west of the Nine Hour and Mr. Robinson was careful to set his stakes so as not to conflict with the St. Louis, and so as to leave a strip of vacant ground between his claim and the St. Louis. (Record, p. 13.) Both Charles and William Mayger were on the Nine Hour Claim after its location, and did not make any claim that it conflicted with the St. Louis. (Record, p. 14.) nor was any such conflict known to exist until the St. Louis Lode was surveyed for patent, at which time the easterly side line was run at an angle to the true line, from their northeast corner to their southeast corner stakes, so that a corner known as corner No. 2 was placed within the boundaries of the Nine Hour Lode Claim and so that the easterly side line instead of being a straight line, as it was originally staked, was an obtuse angle between said corner stakes. (Record, p. 17.)

Upon Mayger's filing his application for an United States patent in the Land Office, Robinson and Huggins filed an adverse claim, which was settled by the execution of the bond mentioned in the complaint, copy whereof is attached thereto as "Exhibit A." From the date of making the bond up to the 10th day of June, 1893, the testimony shows that Robinson and Huggins and their successors in interest had the unquestioned possession of the premises. (Record, p. 15.) At the time of making the bond the greater part of their blacksmith shop was upon the "thirty-foot strip," as the property described in the complaint was designated. The dump from the discovery shaft was also on the strip and Robinson sunk prospect holes on the strip afterwards, had a road on it and generally used it as he used any other part of the Nine Hour Claim. The top of the discovery shaft of the Nine Hour Claim was within about ten feet of the easterly side of this strip. (Rec., p. 16) This "thirty-foot strip" as it was termed, was only a small part of the ground actually in conflict between the Nine Hour and the St. Louis, the total area of which was about two acres. The Nine Hour Lode as located stood two-thirds in the name of William Robinson and one-third in the name of James Huggins, and the title of the plaintiff to the property came through mesne conveyance from the original locators, the description in the deed in each case being for the Nine Hour Lode Claim, as recorded in the office of the County Recorder of Lewis and Clarke county, in Book of Lodes, page 457, to which reference was made for a more complete description of the said Lode Mining Claim; or, in some of the later ones, as survey lot No. 63, survey 1705, which survey embraced the Nine Hour Lode as originally located.

NO FEDERAL QUESTION INVOLVED.

The chief contention of the defendants on the trial of this case was that the contract sought to be enforced, Exhibit "A," attached to the complaint, was contrary to public policy and therefore void. It was contended that the allegations of the complaint, and the proof in the case clearly showing that at the date of the execution of the said bond, the strip of land in controversy was a part of the Nine Hour Lode, and was not then, and had never been a part of the St. Louis Lode, any agreement that it should be entered by Mayger, as a part of the St. Louis Claim, was *contra bonos mores*. It was not pretended that there was any provision of the Mineral Lands Act expressly forbidding the alienation of a mining claim, or of any portion of it, or that the entry by one of the parties, of ground in reality belonging to the other, was in any sense a fraud, as against the government, but it was claimed that in contemplation of law, only the actual owner of the claim was entitled to enter it and obtain a patent for it; that where one made application to enter a mining claim and there was embraced therein ground claimed by another, it was the latter's duty to file an adverse claim in the land office, and thereafter bring, in some court of competent jurisdiction, an action to determine the right to the possession of the area in conflict, which action must be prosecuted to a final judgment or dismissed, and that no valid settlement could be made by which the adverse claimant could acquire any interest in the ground patented by the applicant.

The doctrine is monstrous and finds no support in either law or reason. Settlements of this character are of frequent occurrence in actual practice, and we think it may be safely said that as many adverse suits are compromised, as are finally tried and determined by judgment. The area in dispute is either divided between the respective claimants, or, the applicant, as in the case at bar, is allowed to proceed and obtain a patent for the entire ground covered by the adverse claim, upon his executing an agreement to convey the whole of it or some stipulated portion thereof to the adverse claimant. If there was a valid location of the mining claim in the first place, the area thus claimed becomes segregated from the public domain and becomes the property of the locator. There is no inhibition in the Mineral Lands Act against alienation, and he may therefore sell it, mortgage it or give away the whole or any portion of it as he may see fit.

Forbes v. Gracey, 94 U. S. 762-766.
Belk v. Meagher, 104 U. S. 279-283.
Manuel v. Wulff, 152 U. S. 505-510.
Black v. Elkhorn Mining Company, 163 U. S. 445-449.

No question is raised in the record as to the validity of the location of the Nine Hour Lode by Robinson, the original locator of it, and the proof abundantly shows that his location was in all respects sufficient and valid. When the controversy afterwards arose between himself and Mr. Mayger, as to a portion of it, there was nothing compelling him to file an adverse claim. He might have allowed Mayger to have entered the entire area in conflict had he chosen to do so. The settlement made resulted in giving to him an equitable title immediately, and ultimately he was to have the complete legal title of a piece of ground which rightfully belonged to him. The government was not defrauded in any way, nor was there any legal or moral fraud involved in the transaction. The law upholds the adjustment of disputed matters without recourse to litigation, and settlements of matters already in litigation are favored.

Hart v. Gold 28 N. W. 831.
Wills v. Neff, 14 Oregon 66.
Cent. Trust Co. v. Wabash, St. L & P. Ry., 29 Fed. 546.

The one federal question in the case, upon which plaintiffs in error sued out their writ, and upon which they base their claim of jurisdiction in this court, is the one we are here discussing. In their petition for a writ of error (Rec., p. 115) they say:

"That in the above entitled cause there was drawn in question the construction of the statutes of the United States, to-wit: The construction of an act of Congress of the United States Approved May 10th, 1872, and a provision or clause thereof, to-wit:: Section 2325, Chapter VI., Revised Statutes of the United States, and other sections of said chapter bearing upon the construction of said section, touching the validity of a certain agreement upon which the right of action of plaintiffs in error is based, marked Exhibit "A" and made a part of the pleadings in said action, and upon the validity of which the title of the said plaintiffs in error and defendant in error depends, to the real estate in controversy; that said premises were and are claimed by defendant in error in said suit and proceedings, under United States patent therefor, and the construction of said section and other sections of said Chapter bearing thereon; that said question not only involves the validity of said agreement under said United States statutes but the validity thereof under the doctrine of public policy, and that the same was in violation of the policy of the laws of the United States, and was void under a proper construction of said laws and the policy thereof, and that the decision of the said Supreme Court of the State of Montana was against the title and right of the plaintiff in error to said premises."

And every assignment of error, made by the plaintiffs in error to the decision rendered by the Supreme Court of the State of Montana is based upon the same proposition; for example, the first assignment of error (Rec., p. 116) is as follows:

'The Supreme Court of the State of Montana erred in holding that the agreement upon which this action was and is based is not void under section 2325, Chapter VI., of the Revised Statutes of the United States, and other sections of said chapter relating thereto; and that said agreement was and is not void as opposed to the policy of said section and chapter, and that the same was and is not void as against public policy in the administration of the land laws of the United States."

It is needless, perhaps, to say that the section referred to does not in terms, or by implication, forbid making such a contract as was here made, nor is there anything to be found in the statutes of the United States prohibitory thereof. The Supreme Court of Montana in the opinion rendered in this case, (Rec., p. 113) after reciting the facts says:

'Our attention has not been called to any statute of the United States that prohibits such contracts, and, unless there is some statutory prohibition, we can conceive of no reason in law or equity, why the contract in this case should be held to be illegal. *Gaines v. Molen, 30 Fed. 27.*"

Montana Mining Co., v. St. Louis M. & M. Co., 51 Pac. Rep. 826.

The decision of the Supreme Court of the State of Montana, upon this question, is exactly in line with the decisions of this court. There is no common law basis for public policy in the federal courts. That which is not contrary to the Constitution or some Statute of the United States, is not contrary to public policy.

Says Chief Justice Chase, in the *License Tax Cases, 5 Wall 4691:*

"This court can know nothing of public policy, except from the Constitution and the laws and the course of administration and decision. It has no legislative powers; it cannot administer or modify any legislative act; it cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must in general be addressed to the legislature. Questions of policy determined there, are concluded here."

Equally clear and conclusive is the language of Mr. Justice Peckham in *U. S. v. Trans Missouri Freight Association, 166 U.S.* 290-340. He says:

"The public policy of the government is to be found in its statutes and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the law making power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."

But if the Mineral Lands Act, like the Pre-emption Act and other acts relating to the disposition of the public lands, contained a distinct inhibition of alienation prior to obtaining a patent, still

the plaintiffs in error would not be able to make a case within the jurisdiction of this court.

Udell v. Davidson, 7 How. 769.

In this case a pre-emptioner under the act of 1838 agreed to enter land and then convey it in trust to the creditors of one to whom he had sold his inchoate right of pre-emption. Relying upon this agreement the creditors advanced money to enable the pre-emptioner to pay for the land. Title was obtained in accordance with the agreement and conveyed to the trustee by a deed absolute on its face. Upon the refusal of the trustee to carry out the agreement, an action was brought by the creditors to enforce the trust, and to this bill the trustee demurred on the ground that the agreement, in pursuance of which the title was conveyed to him was in violation of the Act of 1838. The demurrer was overruled and the trust declared, and on appeal to the Supreme Court of the State the decision was affirmed. To this decision a writ of error was sued out and the case taken to the Supreme Court of the United States, on the ground that a title, right or privilege or immunity, claimed by the plaintiff in error under the laws of the United States, was called in question and decided against them, which is precisely the contention in the case at bar. Mr. Chief Justice Taney in granting the motion to dismiss the writ of error says:

"They do not claim that Udell obtained a valid title by the entry made by Gregory, and his subsequent conveyance to Udell. And if their defense had been placed on that ground it would not have given jurisdiction to this court, because the proceeding to charge it with a trust created by contract would have been no impeachment of the grant made by the United States. They defend themselves upon the ground that the transaction between them and Gregory, by which the entry was made under a previous contract to convey, was a violation of the Act of 1838. This is undoubtedly true, for the act required the party who claimed the right of pre-emption by residence, to make oath that he has not contracted to sell or transfer the land to any other person. And he is not permitted to purchase at the low price at which a person entitled to pre-emption is allowed to buy, until his oath is taken and filed with the Register of the Land Office. And if he swears falsely he is liable to an indictment for perjury, and forfeits all title to the land, and deeds made by him convey no title, unless they are made to a *bona fide* purchaser without notice.

"The plaintiffs in error admit that they participated in the fraud, and consequently Udell, upon their own showing, has acquired no right to the land under the act of congress on which he relies. They do not claim that he obtained a valid title under the law, but insist that the transaction was against its policy and in

violation of its principles. What right or privilege does he then claim under this act of Congress? It is this: He not only admits, but insists, that by a fraud upon the government he has obtained a deed for himself for this land, and that he being trustee for the creditors of Miller, used the money which belonged to his *cestuis que trust* to accomplish his purposes; and now contends that by means of this fraud upon the government, he has acquired under this act of Congress a right to perpetrate a fraud also upon his *cestuis que trust*. This in plain words is the amount of his defense; and this is the right or privilege which he claims under the provisions of the act of 1838, and calls upon this court to recognize and maintain. We shall not comment upon such a claim."

Udell v. Davidson was affirmed in Walworth v. Kneeland, 15 How., 348.

This was an action to obtain the specific performance of a contract for the conveyance of a certain quarter section of land described in the bill. The contract under which the complainant claimed was alleged to have been made by one Walworth, with a certain Jonathan E. Arnold; that Arnold in pursuance of, and in execution of the agreement with Walworth, entered upon and took possession of the land and afterward assigned his interest to the complainant, who took possession and still held it when his bill was filed; that Walworth had become the purchaser pursuant to his agreement with Arnold, and obtained a legal title from the United States, and was bound under that agreement, and the assignment of Arnold above mentioned, to convey the land to the complainant. Upon the final hearing in the State court, Walworth was directed to convey to the defendants in error one-half of the quarter section in controversy. The case was appealed to the Supreme Court of the State, where the decree was affirmed and a writ of error was sued out to reverse the decree. The facts upon which he based his rights to sue out a writ of error in the case, to this court, were stated in the answer, and seemed to be that at the time the contract was made there was no act of Congress which authorized settlement on the land, or gave any right of pre-emption to those who had settled on it; that they were trespassers, and had illegally combined with a large body of men of like character, who had settled upon the public lands in that district, which were in the same situation, to secure to each other the lands settled upon by them respectively, and to that end, they were to prevent the lands from being sold for more than one dollar and twenty-five cents per acre; and to secure to each other the said lands at that price; that they had adopted rules and regulations and established a land office in which their respective claims were to be entered, and had agreed that if the government refused to grant the right of pre-emption at the

price above named, and directed them to be sold at public auction, the settlers would by force and terror, or as said in the answer, "by club or lynch law" prevent any one from bidding against the settler for the land he had entered at their land office, and would by such means enable the settler to get the land at the minimum price of $1.25 per acre; that under an agreement of this character Frisbee was to hold possession, have the claim entered at the settlers' land office, and if they ultimately succeeded in pre-empting the land, he and Frisbee or Arnold were to share in the profits; that is, each to have an equal interest in the tract of land, he, Walworth, to furnish the money to pay for the land.

In dismissing the bill Mr. Chief Justice Taney refers to the fact that the State Supreme Court had declared in its decree that such a contract as was alleged in the answer would be void, and that it held in favor of the defendant in error, on the ground that it was not proved by legal testimony that either Frisbee, or Arnold, had undertaken to associate themselves with the illegal combination of settlers, "But if it had been otherwise," said Chief Justice Taney, "and the State court had committed so gross an error as to say that a contract forbidden by an act of Congress or against its policy, was not fraudulent and void; and that it might be enforced in a court of justice, *it would not follow that this writ of error could be maintained.* In order to bring himself within the twenty-fifth section of the Act of 1789, he must show that he claimed some right, some interest, which the law recognizes and protects and which was denied to him in the State court. But this Act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights or merits, but from the want of merits and good conscience in the party asking the aid of the court. But to support of this writ of error he must claim a right which, if well founded, he would be able to assert in a court of justice upon its own merits, and by its own strength. No such right is claimed in the answer of the plaintiff in error. And indeed it would be a novelty in legislation and in public policy if Congress had taken so much pains to provide for the protection of persons who had combined with others to perpetrate a fraud on the United States and found themselves in the end the sufferers by the speculation; or who, by the error of a State court, had been compelled to share its gains with their associates in the fraud. The right or interest claimed in the State court must be of a very different character to entitle him to the protection of the Act of 1789. It has already been so decided in the case of *Udell v. Davidson, 7 How. 769.*"

These cases have never been overruled, or the doctrine therein laid down doubted, and they seem to us to be absolutely conclusive upon the proposition that even if the settlement made was, as contended by plaintiffs in error, contrary to public policy, and the bond for a deed, Exhibit "A," absolutely void for that reason, this court would not have jurisdiction of the case. The doctrine established by them is clear. No federal question is raised because the plaintiffs in error do not by their answer or otherwise, set up any right, title, privilege or immunity arising under the law or Constitution of the United States, within the meaning of Section 709 U. S. Revised Statutes. As is said in *Udell v. Davidson*, the plaintiffs insist that because by reason of a fraud upon the government they obtained title to the ground in controversy, they have acquired a right to perpetrate another fraud upon the defendant in error. Such a contention ought not to find favor in any court.

THE WRIT SUED OUT FOR DELAY ONLY.

It is manifest from the most casual examination of the record that this writ of error was sued out for delay only. After a careful trial of the case, a full and careful argument in the State Supreme Court, and the well considered opinion rendered by that tribunal, they cannot seriously think that there is anything in their contention. It is like all of the other proceedings taken by them since the rendition of the original decree in the case. Take, for example, their motion for a new trial. The decree was entered in the State Dist. Court on June 1st, 1895. (Rec., p 96) On June 10th, the last day allowed them by statute for that purpose, they served their notice of intention to appeal from the judgment, which appeal was perfected by filing the requisite undertaking. On the 13th of the same month they served their statement on motion for a new trial, to which certain amendments were suggested promptly, and within the time allowed by the statute therefor, but it was not until the 13th day of July, 1896, one whole year after the filing of their statement, that they presented their statement to the court for settlement. (Rec., p. 106.) This is not the only inexcusable delay on the part of the plaintiffs in error, shown by the record, and we think the court is fully justified in finding that this writ was sued out for delay only.

THE QUESTION UPON WHICH JURISDICTION DEPENDS IS SO FRIVOLOUS AS NOT TO NEED FURTHER ARGUMENT.

But if it shall appear that this court has jurisdiction, then we say that the question is so frivolous as not to need further argument. As already remarked, just such settlements of controversies and disputes over the right of possesion of mineral land, as the one

shown in the case at bar, are of almost daily occurrence, in applications to enter and obtain patents to mineral lands, and yet, until this case, it does not seem to have occurred to any one that such settlements were contrary to public policy, or to any statute of the United States. The learned counsel for plaintiffs in error have the honor of raising this question for the first time in any court of last resort.

We have already seen that when a valid location of a mining claim is made, the area thereof becomes segregated from the public domain and the claimant is the owner thereof, so long as he performs the annual labor requisite to maintain his title, as fully to all intents and purposes as if he had a patent for it. There are no conditions attached to his grant, and no restrictions upon his enjoyment of his property as he may desire. Under these circumstances, certainly a settlement and arrangement of a dispute with reference to the right of possession of a portion of the surface of a mining claim, fair upon its face and satisfactory to the parties at the time it was made, such as shown by the record in this case, must be upheld, unless it be found to contravene some express Act of Congress or some fundamental principle of law, which has been declared by this court to be the basis of a public policy. This court has frequently refused to extend the inhibition against alienation found in the pre-emption law, beyond the letter of the statute, and has therefore, declared that there is no public policy restraining the alienation of rights in lands acquired under the United States, unless it is expressly forbidden by statute.

In *Meyers v. Croft*, *13 Wall*, *291*, this court was asked to hold that the prohibition against alienation found in the last clause of the 12th section of the Pre-emption Act of 1841, extended from the date of entry until the actual issue of patent. This the court declined to do, and held that the object of the act was attained when the pre-emptor went with clean hands to the Land Office and proved up and paid for his land. The court says:

"Restrictions under the power of alienation after this would injure the pre-emptor and would serve no important purpose of public policy. It is well known that patents do not issue in the usual course of business in the General Land Office until several years after the certificate of entry is given; and equally well known that nearly all the valuable lands in the new states admitted since 1841 have been taken up under the pre-emption laws, and the right to sell them freely exercised after the claim was proved up, the land paid for and the certificate of entry received. In view of these facts, we cannot suppose, in the absence of an *express declaration to that effect*, that Congress intended to tie up these lands of the original owners, until the government should choose to issue the patent."

In *Davenport v. Lamb, ibid, 418*, the court upholds a covenant made by certain grantors "that if they obtain the fee simple to said property, from the government of the United States, they will convey the same to the grantee, his heirs or assigns, by deed of general warranty." This was with reference to a tract of land taken up under what is known as the Oregon Donation Act, which contained a provision against alienation in all respects similar to that found in the pre-emption act, but the deed containing this covenant was made prior to the passage of the act, as appears by the case of *Lamb v. Davenport, 18 Wall, 307*. In this case the point that this covenant was against public policy, was distinctly made, but this court refused to sustain it, holding that the Donation Act not having been passed at the date when the contract was made, there was no inhibition against the making of such contracts, and this court declined to give the statute a retrospective operation.

In *Lamb v. Davenport* one might well suppose that this court was discussing the right of a miner to his mining claim. Speaking of claims under the Oregon Donation Act, Mr. Justice Miller says:

"They were the subject of bargain and sale and as among the parties to such contracts they were valid. The right of the United States to dispose of her own property is indisputed, and to make rules by which the lands of the government may be sold or given away is acknowledged, but subject to these well known principles, parties in possession of the soil might make valid contracts even concerning title predicated on the hypothesis that they might thereafter lawfully acquire the title, except in cases where Congress has imposed restrictions on such contracts."

The same principle was determined in *Thredjill v. Pintard, 12 How., 24*, as applicable to the pre-emption law. A settler on the public lands having a pre-emption right sold his land to a person who again sold to a third party. The original vendor was decreed a lien upon the land for a balance of the purchase money still due him, notwithstanding the vendee had taken out a patent in his own name, under a subsequent pre-emption law.

One of the clearest and strongest cases which we have been able to find is that of *Gaines v. Molen, 30 Fed. 27*. The plaintiff in that case had purchased, enclosed and cultivated a portion of the Hot Springs reservation in the State of Arkansas, and had sold a part of the tract to defendant, who went into possession of it and built a house on it. The defendant at the time of his purchase entered into an agreement in writing to reconvey to the plaintiff an undivided half interest in the tract within thirty days after he acquired title to it from the government. In this contract it was agreed, among other things, that the plaintiff should furnish the evidence necessary to enable the defendant to make entry of the

tract under the provisions of an act for the relief of settlers upon the Hot Springs reservation then pending, but which had not then passed Congress. This contract was agreed to be, and was kept secret. After the passage of the Act, the entry was made, the plaintiff furnished the necessary evidence, but the defendant refused to make the conveyance, and suit was brought to enforce the specific performance of the contract. The defendant pleaded want of consideration and illegality of the contract. Mr. Justice Brewer, then upon the bench of the Circuit Court for the Eastern District of Arkansas, says:

"The contract which was made was in no manner a violation of any act of Congress, nor did it contravene any public policy. It was a contract between two parties who might possibly be contesting claimants under some future act of Congress, for a settlement of their respective claims. The case of *Sutherland v. Whittington, 46 Ark. 285*, is very much in point, and the decision of that learned court is in accord with the views I have expressed. See also *Lamb v. Davenport, 18 Wall. 314*."

As before remarked, contracts of this character are of frequent occurrence in the entry of mineral lands, and in *Ducie u. Ford, 8 Mont. 233*, suit was brought to enforce the specific performance of a verbal contract of this character. The plaintiffs claimed that the defendant had agreed to deed them the undivided one-half of a certain mining claim, after patent had been obtained, in consequence of plaintiffs abstaining from filing adverse proceedings and paying one-half of the expenses of obtaining a patent. The plaintiffs had located the ground as the "Figi Lode" and the defendants claimed the same ground as the "Odin Lode." As is argued in the case at bar, one or the other of these parties was entitled to enter the ground, and collusive entry by the wrong party would have been against the policy of the law, if the doctrine contended for by the plaintiffs in error is to obtain. Nevertheless, the case was decided upon the proposition that the contract was within the statute of frauds, and was void for want of a writing. The proposition that there was anything so radically wrong about such a contract as rendered it *contra bonos mores*, does not seem to have occurred to the Honorable Supreme Court of the State of Montana.

This case was appealed to the Supreme Court of the United States and this learned tribunal decided it upon the question of the statute of frauds, and seemingly without any suspicion that such a contract, whether oral or in writing, would be void as contravening some statute of the United States, or as being contrary to public policy.

Ducie v. Ford, 138 U. S., 587.

Such bonds as the one here in suit, are enforced without question by the courts, and in no case that we have been able to find has even a doubt been suggested as to their validity.

Turck v. Mining Co., 5 Pac. 838.

O'Keefe v. Dyer, 52 Pac. 197.

The case of *Mitchell v. Cline, 84 Cal. 409*, cited and relied upon by counsel for plaintiffs in error in their brief in the court below, is not at all in point. In that case there had been a fraudulent location of placer mining ground by which three persons in one case, had located one hundred and fifty acres, the law limiting the amount of ground to be located by one person to twenty acres. This was done by means of dummy locators; that is to say, the ground was located in the names of friends of the parties, who afterwards and without consideration conveyed to the persons who were the actual claimants. The court very properly refused to look into, or consider the agreement under which the title to the ground was thus obtained, but granted partition of the claims according to the title of the parties respectively as the same appeared of record.

In *Miller v. Ammon, 145 U. S. 421* the action was to recover for liquor sold in violation of a statute, requiring persons dealing in spirituous liquors to obtain a license and making it a penal offense to sell liquors without obtaining a license.

In *Swanger v. Mayberry, 59 Cal. 91*, a recovery was sought for timber cut on the public lands of the United States, the statutes forbidding such cutting, and substantially the same state of facts existed in *Ladda v. Hawley, 59 Cal. 51*.

Without reviewing the authorities found cited in their brief we deem it safe to say that in each case the matter constituting the cause of action was found to contravene the provisions of some express statute, and only serves to accentuate and emphasize the rule laid down in *Myers v. Croft* and other cases cited *supra*. It is a sufficient answer to this line of authorities to say that in the case at bar there was no statute which, in express terms, or by any fair implication, forbids the making of such a contract as is here in controversy. Nor is there anything in the Mineral Lands Act from which it can be contended with any show of reason that Congress intended in cases arising under it, to abrogate or annul the old legal maxim *republicae ut sit finis litium*.

Respectfully submitted,

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ST. LOUIS MINING AND MILLING COMPANY *v.* MONTANA MINING COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

No. 305. Submitted October 10, 1898. — Decided October 31, 1898.

The court again holds that when there is color for a motion to dismiss on the ground that no Federal question was involved in a judgment of a state court, this court may, under a motion to dismiss or affirm, dispose of the case.

When a location is made of a mining claim, the area becomes segregated from the public domain and the property of the locator, and he may sell

Statement of the Case.

it, mortgage it or part with the whole or any portion of it as he may see fit; and a contract for such sale is legal and will be enforced by the court.

Where an application to enter a mining claim embraces land claimed by another, the latter is under no obligation to file an adverse claim; but he may make a valid settlement with the applicant by contract, which can be enforced against him after he obtains his patent.

THIS was a suit for specific performance brought by the Montana Mining Company against the St. Louis Mining and Milling Company of Montana and Charles Mayger in the district court of the First Judicial District of the State of Montana, in and for the county of Lewis and Clarke.

The complaint alleged that on March 7, A.D. 1884, plaintiff's predecessors in interest, Robinson, Huggins, Sterling, De Camp and Eddy, were the owners of, and in possession, and legally entitled to the use, occupation and possession, of a certain portion of the Nine Hour Lode and Mining Claim, which embraced in all an area of 12,844.5 feet, together with the minerals therein contained.

That Mayger applied to the United States land office at Helena for a patent to the St. Louis Lode Mining Claim, owned by him, and that in the survey he caused to be made of his claim he included that part of the Nine Hour Lode Mining Claim described in the complaint, whereupon an action was commenced by Robinson and Huggins against Mayger in the district court of the Third Judicial District of the then Territory of Montana to determine the right to the possession of the particular premises. That on said seventh of March, for the purpose of settling and compromising that action, and settling and agreeing upon the boundary lines between the Nine Hour Lode Mining Claim and the St. Louis Lode Mining Claim, Mayger made, executed and delivered to Robinson, Huggins and Sterling a certain bond for a deed, whereby, in consideration of the compromise and settlement of the action and the withdrawal of the protest and adverse claim, he covenanted and agreed that when he should obtain a patent as applied for, he would, on demand, make, execute and deliver to Robinson, Huggins and Sterling, or their assigns, a good

and sufficient deed for the premises described in the complaint; and thereupon Robinson, Huggins and Sterling dismissed their said action, withdrew their adverse claim, and performed all of the conditions of the bond on their part.

That Mayger then proceeded with his application and obtained a patent, but that he gave no notice to plaintiff, or any of its predecessors in interest, of the obtaining of the patent until some time in November, 1889.

That when the bond for a deed was executed, plaintiff's predecessors in interest were in possession of the premises, and have ever since been and are yet in possession thereof, holding and using the same as a part of the Nine Hour Lode Claim; that by mesne conveyances the title to this claim, including the portion in dispute in this suit, had come to plaintiff; that it is entitled to a conveyance of the premises from Mayger; that Mayger, on or about June 10, 1893, assumed to convey said piece of ground to the St. Louis Mining and Milling Company, which then had full knowledge and notice of the making, execution and delivery of the bond for a deed by Mayger, and of the rights and equities of the Montana Mining Company thereunder; that the St. Louis Company has instituted a number of suits in the Circuit Court of the United States, in which it claims that it is the owner of the premises described in the complaint, and also the right to recover certain sums of money for ores alleged to have been wrongfully extracted therefrom. The bond referred to was appended to the complaint. The prayer was that the court should decree that defendants should convey to plaintiff a good and sufficient deed to the premises in controversy.

The answer denied all the material allegations of the complaint, and affirmatively alleged that the adverse claim interposed to the application of Mayger for a patent was for the purpose of harassing and hindering Mayger in obtaining a patent to his mining claim, and that the bond was given contrary to equity, good conscience and public policy.

The case was tried by the district court without a jury, and the court made and filed findings of fact and conclusions of law. It was found that plaintiff's predecessors in interest

were at the time mentioned in the complaint the owners of, in possession, and entitled to the possession, of the Nine Hour Lode Mining Claim as described, and that the strip of ground in dispute was at the time and continued to be a part of said claim; that the bond was executed and delivered by Mayger to the parties therein named, binding Mayger to convey to them or their assigns the ground in question when Mayger obtained a patent therefor; that it was given as a compromise and settlement of the controversy as to the land now in dispute, and then in litigation between the parties, and for the purpose of fixing and determining the boundary line between the Nine Hour Lode Mining Claim and the St. Louis Mining Claim, as alleged in the complaint, and that Mayger thereafterwards did obtain a patent covering the premises in dispute; that plaintiffs in the adverse mining suit, on the execution to them of the bond by Mayger, dismissed their action and performed all the conditions of the contract on their part; that at the time of the execution of the bond the predecessors of plaintiff were in actual possession of the ground in dispute, and that they and plaintiff have ever since remained in possession thereof, claiming and holding the same as a part of the Nine Hour Lode Mining Claim; that at the date of the execution and delivery of the bond, it was expressly agreed between the parties thereto that all of the ground lying to the east of the westerly line of the strip should be a portion of the Nine Hour Lode Mining Claim; that plaintiff is the successor in interest of Robinson, Huggins and Sterling, the obligees named in the bond, and also of De Camp and Eddy, who were cotenants with said obligees in the premises at the date of the execution of the bond; that the mesne conveyances introduced in evidence on the part of plaintiff embraced and were intended to include the ground in question, and conveyed to the grantees therein named all of the interest, legal and equitable, which the grantor or grantors had in said premises, covering as well their interest in the ground in dispute as in every other part and parcel of the Nine Hour Lode Mining Claim.

That in July, 1893, plaintiff duly demanded a deed to the

ground in dispute from defendants, which defendants refused to execute; that in June, 1893, Mayger assumed to convey the controverted ground to the St. Louis Mining and Milling Company, but that at the date of his conveyance the St. Louis company had full notice and knowledge of plaintiff's equities in and to the disputed strip, and of its possession thereof; that defendants wrongfully asserted title to the ground in controversy, and thereby clouded plaintiff's title thereto, which cloud plaintiff had a right to have removed.

The district court concluded as matter of law that plaintiff was entitled to the conveyance prayed for, and that defendants should be enjoined from asserting any right, title or interest in or to the ground in dispute, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

In accordance with the findings of fact and conclusions of law, a decree was entered for plaintiff, and defendants appealed to the Supreme Court of the State of Montana, by which it was affirmed. 51 Pac. Rep. 824.

This writ of error was then sued out, and defendants in error now move to dismiss the writ, or that the decree be affirmed.

Mr. A. B. Browne on behalf of *Mr. Charles J. Hughes, Jr.*, and *Mr. W. E. Cullen* submitted their brief in support of the motion.

Mr. W. W. Dixon, *Mr. Thomas C. Bach* and *Mr. Edwin W. Toole* opposing.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

While it is conceded by plaintiffs in error that there is no express prohibition on the transaction involved in the record, it is contended that the contract was contrary to the policy of the law, and that the question thus raised is necessarily a Federal question. Granting that this is so, and that the

motion to dismiss must, therefore, be overruled, we are of opinion that there was color for the motion, and that the case may properly be disposed of on the motion to affirm.

The Supreme Court of Montana ruled that, in the absence of statutory prohibition, there was no reason in law or equity why the contract sought to be enforced should be held illegal, and we concur in this disposition of the Federal question suggested.

The public policy of the Government is to be found in the Constitution and the laws, and the course of administration and decision. *License Tax cases*, 5 Wall. 462; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 340.

The proposition of plaintiffs in error is that where an application to enter a mining claim is made, and there is embraced therein land claimed by another, it is the duty of the latter to file an adverse claim and thereafter bring in some court of competent jurisdiction an action to determine the right to the area in conflict, which action must be prosecuted to a final judgment or dismissed; and that no valid settlement can be made by which such adverse claimant can acquire any interest in the ground when thereafter patented by the applicant. We are not aware of any public policy of the Government which sustains this proposition.

Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. There is no inhibition in the Mineral Lands Act against alienation, and he may sell it, mortgage it or part with the whole or any portion of it as he may see fit. *Forbes* v. *Gracey*, 94 U. S. 762, 766; *Manuel* v. *Wulff*, 152 U. S. 505, 510; *Black* v. *Elkhorn Mining Company*, 163 U. S. 445, 449.

The location of the Nine Hour Lode was in all respects sufficient and valid. When the dispute afterwards arose between Robinson and Mayger as to a portion of it, there was nothing to compel the filing of an adverse claim. The settlement made gave Robinson an equitable title immediately, and ultimately he was to have the complete legal title, to a piece of ground, which it seems rightfully belonged to him. The Government was not defrauded in any way, nor

was there any legal or moral fraud involved in the transaction. The settlement and adjustment of the dispute with reference to the right of possession appears upon its face to to have been satisfactory to the parties when made, and should be upheld unless contravening some statute or some fundamental principle of law recognized as the basis of public policy. There was no such statute, and settlements of matters in litigation, or in dispute, without recourse to litigation, are generally favored, and are apparently of frequent occurrence in regard to mining land claims; nor is there anything in the decisions of this court to throw doubt on their validity.

In *Ducie* v. *Ford*, 138 U. S. 587, a contract of the character of that under consideration was passed on in a suit brought to enforce its specific performance, and it was assumed that the contract was not void as in contravention of any statute of the United States, or contrary to public policy. In *Meyers* v. *Croft*, 13 Wall. 291, this court was asked to hold that the prohibition against alienation found in the last clause of the twelfth section of the preëmption act of 1841 extended from the date of entry to the actual issue of patent. This the court declined to do, and decided that the object of the act was attained when the preëmptor went with clean hands to the land office and proved up and paid for his land. And the court said: "Restrictions upon the power of alienation after this would injure the preëmptor, and would serve no important purpose of public policy. It is well known that patents do not issue in the usual course of business in the general land office until several years after the certificate of entry is given, and equally well known that nearly all the valuable lands in the new States, admitted since 1841, have been taken up under the preëmption laws, and the right to sell them freely exercised after the claim was proved up, the land paid for, and the certificate of entry received. In view of these facts we cannot suppose, in the absence of an express declaration to that effect, that Congress intended to tie up these lands in the hands of the original owners, until the Government should choose to issue the patent."

In *Davenport* v. *Lamb*, 13 Wall. 418, a covenant made by certain grantors "that if they obtain the fee simple to said property, from the Government of the United States, they would convey the same to the grantee, his heirs or assigns, by deed of general warranty," made with reference to a tract of land taken up under what was known as the Oregon Donation Act, was upheld although the point that the covenant was against public policy was distinctly made.

In *Lamb* v. *Davenport*, 18 Wall. 307, 314, Mr. Justice Miller, speaking of claims under that act, said: "They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid. The right of the United States to dispose of their own property is undisputed, and to make rules by which the lands of the Government may be sold or given away is acknowledged; but, subject to these well known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicted upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where Congress has imposed restrictions on such contracts."

And to the same effect see *Gaines* v. *Molen*, 30 Fed. Rep. 27, where the subject was considered by Mr. Justice Brewer, then Circuit Judge.

Anderson v. *Carkins*, 135 U. S. 483, 487, involved a contract made by a homesteader to convey a portion of a tract when he should acquire title thereto from the United States, and was disposed of on different grounds. It was stated in the opinion that: "The theory of the homestead law is that the homestead shall be for the exclusive benefit of the homesteader. Section 2290 of the Revised Statutes provides that a person applying for the entry of a homestead claim shall make affidavit that, among other things, 'such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person.' And section 2291, which prescribes the time and manner of final proof, requires that the applicant make 'affidavit that no part of such land has been alienated, except

as provided in section twenty-two hundred and eighty-eight,' which section provides for alienation for 'church, cemetery or school purposes, or for the right of way of railroads.' The law contemplates five years' continuous occupation by the homesteader, with no alienation except for the named purposes. It is true that the sections contain no express prohibition of alienation, and no forfeiture in case of alienation; yet, under them the homestead right cannot be perfected in case of alienation, or contract for alienation, without perjury by the homesteader. . . . There can be no question that this contract contemplated perjury on the part of Anderson, and was designed to thwart the policy of the Government in the homestead laws, to secure for the benefit of the homesteader the exclusive benefit of his homestead right."

In the case at bar there was no statute which, in express terms, or by any fair implication, forbade the making of such a contract as that proceeded on here.

Decree affirmed.